Office Supreme Court, U. S.
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No. 480.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

PAINE LUMBER COMPANY, Limited, *et als.*,
Appellants,

against

ELBRIDGE H. NEAL, etc., *et als.*,
Appellees.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR APPELLANTS

DANIEL DAVENPORT,
WALTER GORDON MERRITT,
Solicitors and Attorneys for Appellants.

CARROLL PRINTING CO., INC., 64 CHURCH ST.

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IN THE

Supreme Court of the United States

PAINE LUMBER COMPANY, LIMITED, *et al.*,
Appellants,

against

ELBRIDGE H. NEAL, etc., *et al.*,
Appellees.

BRIEF FOR APPELLANTS.

Preliminary Statement.

The bill of complaint seeks an injunction against an illegal combination of union employers and employees to restrain and destroy the trade and business of the complainants, who are open shop employers, and this appeal is taken from the decree of the United States Circuit Court of Appeals for the Second Circuit, affirming the decree of dismissal by the District Court. The Circuit Court of Appeals cited no authority and the only things decided in its opinion of nine lines (p. 2924) is contained in the following sentence: "We agree with Judge Mayer that since it clearly appears—indeed the proposition is not disputed—that defendants' acts were not maliciously nor personally directed against the individual complainants, injunctive relief, which is all they pray for, cannot be granted in this suit."

214 Fed., 82.

In the District Court, Judge Mayer rendered a

comprehensive opinion in which he held that the combination in question violated the Federal Anti-Trust Law, the State Anti-Trust Law, Subdivision 6 of Section 580, of the Penal Law, and the common law, but that the complainants, although injured by such acts, did not suffer special damages of a character entitling them to private relief (212 Fed., 259). Simultaneously with the decision of this case by the District Court, Circuit Judge Ward rendered a decision in the case of Irving vs. Neal, 209 Fed., 471, involving substantially the same facts and the same union defendants, in which he, like Judge Mayer, held that the combination in question violated all of the laws above stated, but that a private litigant being irreparably injured in his property rights, by Subdivision 6 of Section 580 of the Penal Law, was entitled to an injunction.

In both of these cases it was found as a matter of fact that the combination was a general movement to discriminate against all open shop merchandise of a special character and that there was no different discrimination against the complainants in that regard. Judge Ward stated:

> "While there is no evidence of a special hostility to the complainants in particular as maintaining an open shop, the proofs show a persistent campaign has been made by the combination to compel them to unionize their shop. They suffer in a way different from the community at large. This entitles them to all available civil remedies, among others, the injunctive relief."

Parties.

The complainants are each of them corporations of other States than New York, operating open shops in the manufacture of doors, sash,

blinds, etc., in States other than the State of New York and conducting a large interstate business in these products. All except the Lotham Cypress Company and Curtis & Yale Company have a large and valuable business with customers in New York City and these two complainants are ready and able to dispose of their products in New York City if the channels of commerce are kept free from unreasonable obstruction.

The first twenty-three of the defendants are officers or agents of the United Brotherhood of Carpenters & Joiners of America, or its subsidiary branch, the Joint District Council of New York and Vicinity, which has jurisidction over all matters in New York City, subject to the supervision of the National Organization.

The next five defendants are, Murray & Hill Company, Harlem River Lumber & Woodworking Company, Empire City-Gerard Company, David W. O'Neil, and James C. Forbes, all union manufacturers of wood materials operating closed shops in competition with the complainants' open shops. *Not one of them took the witness stand.*

The remaining defendants, who are over 100 in number, are master carpenters or builders, all of whom are members of the Master Carpenters' Association of the City of New York engaged in the work of building in that City. For the conduct of their business each of these defendants are obliged to purchase materials of the kind that are manufactured by the complainants and are obliged to employ skilled carpenters of the kind that are members of the United Brotherhood of Carpenters.

Bill of Complaint.

The bill of complaint invokes the jurisdiction of the District Court on the ground that the combination violates the Federal Anti-Trust Law Pars. 25, 26) and on the ground of diverse citizenship (Par. 24).

It describes the business of each complainant as that of manufacturing doors, sashes, frames and other kinds of wood trim in their respective cities outside of the State of New York (Pars. 1-5), and an established interstate trade carried on by each (Par. 6). It alleges that all of the complainants employ one or more non-union carpenters and are therefore characterized by the defendants as unfair, non-union or open shops (Par. 7); that their products require the services of skilled carpenters to install them in the buildings for which they are purchased (Par. 8). It describes the valuable market for such products in the City of New York and the fact that complainants have heretofore been supplying said market through the medium of interstate commerce or have been prevented from so doing by reason of the wrongful combination of the defendants (Par. 9).

It describes the United Brotherhood of Carpenters as an unincorporated association of 200,000 journeymen carpenters subdivided into 1,900 local unions in different parts of the United States (Pars. 10-11), and alleges that it owns and controls the use of a certain union label which is attached to woodwork produced in shops which employ only Brotherhood members (Par. 13). It describes the Joint District Council as a representative or federated body of seventy of said local unions which are within the limits of Greater

New York (Par. 14) and alleges that certain defendants are officers and business agents of said United Brotherhood and Joint District Council (Par. 17).

It describes the defendant builders as contractors engaged in the erection of buildings in New York City who, in the course of their business, are required to purchase and use wood trim of the kind produced by the complainants and to employ skilled carpenters of the kind belonging to the United Brotherhood (Par. 20). The bill then alleges that each of the defendant manufacturers are competitors of the complainants in New York City and members of the Manufacturing Woodworkers' Association (Par. 23).

The conspiracy alleged is that all of the defendants except the contractors, have entered into an oppressive and malicious scheme to prevent the pursuit or exercise of the trade of carpentry by any one not a member of the United Brotherhood and "contrary to the laws of Congress of July 2nd, 1890, relating thereto and the laws of the State of New York, to prevent and restrain each of your orators and all other employers of any carpenters not belonging to said Brotherhood, from engaging in interstate trade or commerce, to sell or supply goods for sale, delivery, use and installation in the City of New York and vicinity, and elsewhere outside of the State of their manufacturer" (Par. 25), that certain acts have been done in furtherance of said conspiracy "to restrain, and prevent the conduct of interstate trade or business by all employers who employ any of said non-union journeymen carpenters" (Par. 26). The acts themselves will appear sufficiently in our review of the evidence, but consist primarily of the following:

1. Calling strikes on buildings where complainants' materials are used. If non-union carpenters are employed to install the non-union materials which union carpenters refuse to install, all other trades will strike.

2. An agreement (Exhibit "B", attached to the complaint) entered into by the master carpenters with the Union, in which the master carpenters, in order to avoid strikes on their buildings, accepted a clause which limits their purchases to union-made wood products.

3. An agreement (Exhibit "C", attached to the complaint) between the Union and the Manufacturing Woodworkers' Association, to which each defendant manufacturer belongs, in which the Manufacturers agree to employ only union men and not to purchase open shop material, and the Union "agrees that none of their members will erect or install non-union * * * material."

The bill then alleges that on account of said combination, architects, builders and others who otherwise would have purchased the products of the complainants, for use outside of the State of their manufacture, have been prevented, deterred and intimidated from so doing; "that each and every one of your orators are directly and similarly injured and affected by the aforesaid combination and have their interstate commerce restrained, prevented, obstructed and interfered with to the great and continuing irreparable injury and damage of each of your orators, in excess of $5,000, exclusive of interests and costs" (Par. 27). The complainants have no adequate remedy at law (Pars. 28, 29). They pray for an injunction restraining all acts in furtherance of the combination and a decree declaring that the clauses of agreement Exhibit "B", which restrict

the right of the master carpenters to purchase open shop woodwork, be declared void "and contrary to the laws of the United States relating to restraints of interstate commerce" (p. 54).

Statement of Evidence.

Combination of Union Defendants.

The United Brotherhood of Carpenters and Joiners of America is an unincorporated association of journeymen carpenters with a membership of about 200,000, of which about 160,000 erect materials on the buildings and about 40,000 manufacture in woodworking mills (2058). The Brotherhood is subdivided into 1900 local unions, each of which is an unincorporated association of journeymen carpenters situated in different States and Territories of the United States, and also has affiliated with it many district councils which are representative bodies composed of delegates of the local unions of the Brotherhood in the locality where the district council has jurisdiction. Of such a nature is the Joint District Council of New York and Vicinity which represents the seventy local unions of the Brotherhood in the five boroughs of Greater New York. Under the terms of the Brotherhood's constitution, every member of any local union is also a member of the Brotherhood and the only way in which a man may become a Brotherhood member is by being admitted to membership in one of the 1900 local unions. To obtain this membership, the constitution of the Brotherhood provides that a candidate must receive a two-thirds' vote of the members of the local union to which he makes application (Sec. 88, Exhibit 1a, p. 2661), and that no person who has been expelled or suspended or

rejected by any one of the 1900 local unions in any part of the United States is eligible to membership in any other local union except by consent of the local union which expelled or rejected him and a two-thirds' vote of the local union to which he makes subsequent application (Sec. 80, Exhibit 1a, p. 2660). Pursuant to these provisions, no carpenter is able to secure membership in the Brotherhood except by a two-thirds' vote of the union to which he makes application (Neal, 2446), and the Brotherhood reserves the right to select its members "the same as any other society" (2082-83). The result is that a carpenter who has been rejected or expelled by a local union in San Francisco cannot obtain membership in any of the local unions of New York, without the consent of the San Francisco union, although it appears that union membership is essential to the right to pursue the carpentry trade in New York City.

Since 1904, this private society has been engaged in a National campaign with varying force and success in different communities to bring about a condition where none but union men will be employed in the erection or manufacture of wood materials and where no materials shall be sold in commerce except union materials which are produced by employers who employ their members exclusively. The first official step in this campaign was taken by the Brotherhood at its convention in Milwaukee in 1904, which was attended by some 400 delegates from the local unions in all parts of the United States. At that convention a resolution was offered to place a provision in the constitution that no "member of the U. B. shall be allowed to handle or put up building material coming from a non-union shop or mill located in a district where a majority of the mills are organized" (2173), and was subse-

quently amended and adopted and written into the printed constitution of the Brotherhood as follows:

> "It shall be the duty of all district councils and local unions to promote the use of trim and shop made carpenter work bearing this label and wherever possible *to preevnt the members* under their jurisdiction from encouraging the use of any unfair material by handling the same" (2174.)

The secretary also reported on the large sums of money that had been spent in connection with their "refusal to work with non-union men and to handle non-union materials" (2167), and he adds:

> "On the open shop question there is nothing to arbitrate. Our unions cannot consent to arbitrate a question which involves their very lives" (2168).

He accordingly recommends the formation of a defense fund "to resist the open shop policy" (2169).

President Huber reports that through their efforts they have organized 200 mills in various cities; that in many localities the outside carpenters are ready to help the inside carpenters and in many others they have no use for the men in the mills (2171). The convention also appropriates money to bear the expenses of the case of Purvis v. Local Union, 214 Pa., State 348, which involved the effort of the carpenters to unionize the plaintiffs therein by striking their products as in the case at bar (2175-77).

At the 1906 convention, which was attended by 600 delegates from the local unions, the President reports:

"We have made a special effort which has been crowned with success far beyond our expectations in organizing the mills of this country, making great inroads in the ranks of the Amalgamated Woodworkers' International Union," and "Judging from the success we have had of our work in the past, I still have faith and hope that we will eventually bring about one organization of the men who are employed in the erection and in the manufacturing of material used in the construction of buildings" (2193.)

"During the past two years strenuous efforts have been put forth to organize the mills doing work which necessarily comes under the heading of material for the construction of buildings, and to say the least our efforts along these lines have been exceedingly successful. * * * Instructions from time to time to the organizers have been very definite and in many cases we have had organizers spend one, two, and in some localities three months organizing that class of workmen. From reports received, over 250 mills have been put under the banner of the U. B. during the past two years" (2194).

The secretary reports:

"Two years ago we were face to face with the open shop proposition. * * * But thanks to the firm stand taken by the delegates attending the Milwaukee convention, the open shop has been a failure and is now a dead issue as far as this organization is concerned" (2196);

and he again tells of the large sums of money that have been spent in the "refusal to work with non-union men and to handle non-union material" (2197). He recommends that an emergency fund be formed "for the protection and defense of our members, local unions and district councils when dragged into court or when enjoined and prohib-

ited from performing their duties as members of organized labor" (2197-98) and his recommendation is adopted (2201, 2202).

The treasurer reports on the amount of money spent in fighting injunction suits (2199, 2200), while the committee on the President's report makes a report which is unanimously adopted in which they "*note the advance made in organizing the mills and factories throughout the country and we recommend that the work be continued along these lines until all mills and factories in the woodworking industry are under our jurisdiction*" (2200).

Resolutions are also passed reciting the fact that the conditions of the union mills in the larger cities are handicapped by the unorganized conditions of non-union mills because the larger cities are flooded with the unfair trim and the efforts of the district councils to prevent the use of non-union trim are constantly frustrated by injunctions of the courts, and directing the President to devote more time to the trim question and keep a list of unfair mills for the benefit of the local unions and district councils (2203-04).

At the 1908 convention, the President reports on the splendid work of the organizers (2213) which has brought about a result where 982 mills throughout the United States are under the jurisdiction of the Brotherhood and 189 in New York City out of a total of 230 employ members of the Brotherhood exclusively (2214). Reports are also made of the injunction suits pending which the Brotherhood has in charge, including the cases of People v. McFarlin, 89 Supp., 527; Purvis v. Local Union, 214 Pa. State, 348; Shine v. Fox Brothers, 156 Fed., 357, and Huttig Sash & Door Co. v. Fuelle, 143 Fed., 363 (2214-18), all of which

concern strikes against open shop woodwork. The secretary recommends that additional money be appropriated "for the protection and defense of our members, local unions and district councils when dragged into court" (2219).

In "The Carpneter," which is the official publication of the Brotherhood, the President reports that all injunction suits are "for the sole purpose of obtaining for the employer the official and judicial confirmation of the court of the open shop doctrine" (2130), and tells the members that "the highest authority in the land cannot compel us to handle scab material in the buildings" (2132), and exhorts them to be more conscientious in the refusal to handle non-union materials (2132).

Defendant Cook reports that he has been in St. Louis in an effort to organize the millmen and "found that the employers do not object to the men belonging to the organization, but they do object to telling the men they have to join" (2139).

President Huber states in another issue of "The Carpenter":

> "I clearly see the coming of the day when, the open shop being declared in any city, our organization will at least be in a position to put up a good strong and energetic fight against any employer of that city in any locality where he may have work" (2140-41).

Organizer Hickey reports concerning Philadelphia that there are about 120 woodworking mills there, of which 20 are union, and that their efforts are being directed to the non-union mill owners who are indifferent and hostile and he adds:

> "The cause of this hostile attitude is the outside carpenter's selfishness, he being ready to erect any kind of trim no matter under

> what conditions it was manufactured as long as he got his, but in the last demand the insidemen forced a clause whereby the carpenters agreed that on and after the first of June they would no longer handle any unfair millwork and it is on the strength of this clause that we are working and expect to bring about a conference with the Manufacturers' Association, which includes 90% of the non-union mills (2138-39).

Defendant Cook states that they are soon to close the markets to open shop trim "all over the East" (994); that "they were endeavoring to unionize the territory between New York and Washington" (994) and "in a short time the Eastern territory would be closed and we could not sell our goods any place and that we should get in out of the wet early" (1007). All these statements and reports are uncontradicted and are entirely in accord with President Huber's report at the 1912 convention of the United Brotherhood in which he said (2636):

> "The work attending the organizing of the mills has been aggressively carried forward by practically our entire organizing force at times, and conservatively speaking, one-half of the force has been employed continuously on this most important work. * * * In San Francisco, Chicago, St. Louis, Cleveland, Buffalo, New York City, Syracuse, Rochester, Boston, in fact, we would have to go over practically our entire jurisdiction to name all the cities and towns where we have been successful along these endeavors, and *before another year rolls around, with the impetus and progress obtained thus far, we should have every important mill in the country under the banner and protection of the U. B.* At this writing, we have over 1,100 mills, cabinet shops and job shops under our jurisdiction, and the membership is to be congratulated

> for this most excellent showing because it is by their consistent, insistent and persistent efforts put forth by them, and aided and abetted by the General Officers, which has made this gain a positive and material fact."

These extracts, coupled with the astounding disclosures we will make as to the progress and development in New York City and the methods of procedure show that the ultimate aim of this private society called the Brotherhood, with its 1900 branches and 200,000 members, is to drive out of the business all non-union men and open shop materials by a system of boycott which, under well recognized rules, compels unity of action among its members and branches in all cities in refusing to work with non-union men and on buildings where any open shop employer supplies the materials. If such combination is allowed to carry out the official resolutions of its convention of continuing this work "along these lines until all mills and factories in the woodworking industry are under our jurisdiction," there can be no doubt that their triumphant campaign will soon attain that end. In the case of the united power of such a well-organized machine, which aims not only to exclude the non-union man directly but also to exclude the products of his labor, the rights of individual liberty are lost unless judicial relief can be held out to sustain the independent employer and employee.

Conditions in Manhattan and the Bronx.

In 1903 the Building Trades in New York were torn by constant strife which made the conditions intolerable for the employers because the separate trades were acting independently of each other, while the 30 odd labor unions of all building trades were united in a powerful central body

exacting fees and extortions from the employers and engaging in sympathetic strikes of all trades against them (2510). In order to avoid being "ground up singly" by these sympathetic strikes, which made 'business conditions practically intolerable" (2529-39), the employers were driven into one organization called the Building Trades Employers' Association, which had a membership of about 1,000 from about 30 different trades (2511; 2515; 2573; 2544). Such is the importance of this association that practically no building is erected in New York City but what some of these members have contracts on it (2560), and at this time there were approimately 100,000 journeymen and over 2,500 building operations involved in the New York and Brooklyn building trades (2512). This Employers' Association then adopted the Arbitration Plan (Exhibit A) with the 30 different unions representing their trades, in which the employers agreed under bonds (p. 2545; 143), which they furnished to their association, that they would operate as closed shops employing only members of the respective unions (p. 73) (Sec. 3, Exhibit A), and would arbitrate their differences. Since the adoption of the Plan, the practice of instituting sympathetic strikes by the Board of Business Agents has been reduced, for it "is resorted to only in very extreme cases. It is not the every-day occurrence that it was in former years" (2531), but according to defendants' own witness the unions "have not quite lost it yet" (2529). In the last analysis, it is the possibility of these sympathetic strikes to-day which controls the employers (2530-32).

The Joint District Council, with its 70 local unions and 20,000 members, was a party to this plan, as was the Master Carpenters' Association,

having about 98 members operating in New York City (524) and the Manufacturing Woodworkers' Association operating union mills (518-19). The members of the Master Carpenters' Association include most of the important builders in that trade (525), conducting most of the building operations in Manhattan, Brooklyn and the Bronx (873, 539; 2566; 2590), and while there are nearly 2,000 other master carpenters in New York (528) they are mostly jobbers engaged in doing small work and repairs (2590; 2561). Most of the separate trades connected with the Building Trades Employers' Association also have an agreement with their respective unions (2545) providing for arbitration and the employment of union men, but aside from the carpenters and possibly the stone and marble workers, none of these agreements prescribes the use of union material or attempts in any way to restrict the use of open shop materials (2525-7) and these arbitration agreements without such clauses work satisfactorily (2528).

Building Trades Council.

The Building Trades Council is the union body which corresponds with the Building Trades Employers' Association and it represents 37 different building trades unions in New York City (1304-05) with a combined membership of 65,000 to 90,000 union men to which the secretary issues the only union cards recognized by the delegates (1298-1301; 2361; Sec. 34, Ex. 36, p. 2673). To the Carpenters' District Council of New York which is affiliated it issues about 22,000 cards (1301). The Building Trades Council has a constitution (Exhibit 36, p. 2672), which provides in Sections 36 and 37 for sympathetic strikes of all

trades on a building in case a non-union man is employed in any of the 37 trades, viz. (2674):

> "*Non-Union Conditions.*—Under no circumstances will any organization affiliated permit its members to work with non-union men, or with members of a dual or hostile union to any trade represented, nor allow its members or delegates to sit in any Central Body or Borough Board of Delegates with others than the members or Delegates of Unions represented in this New York Building Trades Council."
>
> "*Immediate Action.*—Wherever or whenever non-union men are found working, immediate action shall be taken by the Business Agents to enforce union conditions on all work; any trade connected failing to co-operate when notified of said conditions shall stand suspended and can only be reinstated upon payment of one hundred dollars."

The Boards of Business Agents which are subsidiary to the Council also have a constitution (1302-03; 1320) which provides for sympathetic strikes (1303; 1327-30, Ex. 37) and they strictly enforce the rule against the employment of non-union men (1332-33), so that nine times out of ten the union men are removed from the work if any question arises (1333) or the union men of all trades quit (2364-65). The recognized union cards read, "Report non-union men on job immediately" (2366).

This Council does not consider complaints against non-union materials (1312-13) because in most trades it would be impracticable to do so on account of the fact that most materials are made in open shops and the Council could not assume such a position for the carpenters unless it also did so for the other trades (1336). This Council does aid directly, however, in the boycott

of open shop trim because it uses the power of its affiliated trades to prevent the employment of non-union carpenters who would be free to handle the open shop material. If a complaint is filed that non-union carpenters are employed on a building the entire trades employed are compelled to strike, even though these carpenters were employed to handle open shop material which the union carpenters had struck against (2364-4, 2571, 2541, 2237). So in this way the Council representing 37 separate trades operates to prevent the use of open shop material by preventing the employment of any carpenters who may handle it, and any affiliated trade which fails to co-operate is suspended from the Building Trades Council, which suspension makes it a hostile organization against which all trades would be compelled to strike. It is not optional with the other trades as to whether they shall strike against non-union carpenters.

It is true that this Building Trades Council technically adjourned on March 6th, 1912, for ulterior reasons, but it is nevertheless perpetuated under the name of the United Board of Business Agents, which has jurisdiction over all boroughs (1998-2000). While no constitution has been adopted for this successor, it still follows the old practice of issuing cards and requiring that only union men be employed in all trades (2361-2), and sympathetic strikes of all trades to secure the employment of union men is still an established practice (2529-31), though not used as frequently as heretofore because non-union men have been well run out of the trade (2616, 2554-5, 1332-3). The carpenters have constantly used this machinery to prevent the employment of non-union carpenters to handle non-union trim (2541, 2569-71, 2600, 383-84, 769-771). The ridiculous attempt

of Blumenberg to deny this is contradicted not only by his own testimony in another case (2648-52), but by the testimony of Tompkins, their own employee and Secretary of the Building Trades Council, and also by Harding, Brown, Groll, Hagemeyer, the records of the Arbitration Committee and the Constitution of the Building Trades Council. Builders generally recognize the existence of this practice (1056-57; 1045-46; 1049-50; 1067-68; 1262-63; 383-4; 666; 825; 1103; 1104; 1181) and fear it (2530-31).

The result of this combination of trades is to completely close all opportunity for open shop building operations in any trade, except in small alteration jobs where the trades are not employed together in considerable numbers.

Impossible to Erect Buildings in New York with Non-union Carpenters.

It is not disputed that it is impracticable to erect a building of substantial size on the Island of Manhattan except by the employment of union men exclusively on the building (2610; 2536). This is the testimony of defendants.

> "The majority of the different trades have agreements with their employers and they only employ union men. Then in the trades where no agreements exist, there seems to be an affiliation between the union of that trade and the other unions that if the employers in those trades employ non-union men, they bring about strikes (2539).
>
> "The interlocking agreements that exist between the various trades on a new building are such that you could not get non-union men to do carpenter work because the plumbing and heating men and all the other thirty odd trades would walk out and you cannot get

non-union men in all those trades sufficient in the city to execute a large contract" (2611).

"The objection from union labor would be so great that a man would not be able to go on with such a contract" (2610).

If non-union men are employed in any of the unionized trades, all of the other trades on the building would strike (2540). In many instances contractors have attempted to employ non-union carpenters and all the trades have quit work. This was what happened on the Alwyn Court building in 1909 (2541), where the carpenters struck against the use of non-union trim and it became necessary to secure non-union carpenters from out of town because there were none to be had in New York (2570). Then 20 trades struck in sympathy (2571) on order of the Board of Business Agents (2302). "You can't get non-union men to do the work" in Manhattan (2616; 2620; 2570; 1473; 1477; 1103; 1695). Outside of union carpenters in New York "there was not any other carpenters to employ" (2580). As a result of these conditions, practically all buildings on the Island of Manhattan are erected by the employment of union men exclusively in all trades (2538-39; 2609). Tompkins, the union secretary, says there are a considerable number of alteration carpenters who work on repair jobs where the force of the United Trades cannot reach them, but "it would take them months to learn the work done by the Brotherhood men" (1340; 1557; 1474).

In the heart of Brooklyn, or the older section, the same conditions exists as in Manhattan, "with the exception possibly of union trim. Non-union trim is used largely throughout the entire borough. Other conditions, union conditions, prevail exclusively in some portions of the borough" (2612). In this section it would not be practical

to erect a large building except by the employment of union men exclusively upon the building.

> "It depends on what you call a large building. In Manhattan the thing is tied tight practically and it is all union. Now, there is sufficient non-union labor around the borough of Brooklyn to put up an ordinary building, not a building like this. It would not be practicable to put up a building like this courthouse in that section with anything but union labor, but it would be quite practicable to put up an ordinary house, but no large builder would undertake it because his other business operations would be tied up if he attempted it." But "a builder who is operating in a non-union section could readily enough come within the union section and put up a building under non-union conditions, but such a builder is not in the habit of putting up large buildings and even if he was, it would be impracticable for him to put up a large buliding in that section" (2613-14).

In the Borough of Brooklyn, the builders have always been free to purchase and have purchased non-union trim (2626; 2586-7).

It is therefore indisputable that in the Boroughs of Manhattan, Bronx and all Brooklyn except the outskirts, non-union carpenters are scarce, and it would be impracticable to employ them if they were numerous because of the united hostility of the 30 other trades. It is a necessity to employ union carpenters.

Fight Against Open Shop Woodwork in Manhattan and the Bronx.

The impossibility of conducting open shop building operations in New York must be borne in mind when we now deal with the struggle of the carpenters' union to compel their employers to

abandon open shop woodwork. Union carpenters alone can be employed and they will not permit the use of open shop materials.

Since 1905, the master carpenters and the carpenters' union have been engaged in one continuous battle over the use of non-union woodwork (2553-55; 2570; 2601-4; 725-81; Strike Book, Exhibit 45). After the United Brotherhood wrote into its constitution in 1904 the provisions requiring all local unions and district councils to *prevent* their members from handling non-union trim, wherever possible, the District Council of New York adopted in its by-laws a provision fining any member $10.00 if he worked with non-union men or on non-union material (Sec. 51, Ex. 38). Defendant Neal testifies that no man has ever been fined under this section, but admits that numerous fines and penalties have been imposed under Section 56 for failure to quit work when so ordered by the business agent (2434), and it apears by his testimony which refers to some 320 penalties imposed for a period of 10 months that at least 30 and perhaps 60 men (2434-5) are disciplined monthly for disobeying various rules. In any of these cases where men are fined for refusing to go out on strike, it may be that the strike order was issued because of non-union material (2436). In the case of Wm. R. Rogers, the man was fined $25.00 under Section 56 for refusing to strike against non-union material (614-18), a part of which was the Paine Company (920, 21), and thereafter expelled for non-payment. An examination of Exhibit 45, which is the union's strike book, will show that the men always quit work on orders and never on their own initiative and it is obvious that no such combination as this could exist except by virtue of of an organization which enforced unity of action and complete obedience

by a system of fines and penalties (1530; 1557; 1479; 1500; 1556-7; 370-4; 1459; 634; 1081; 1089-90; 803-4; 817; 903; 1025; 1051-53).

To more effectively carry out the proscription on non-union material, the union employs spies or tracers to make reports on shipments of open shop goods in order that they may strike the buildings where they are used (2471-77; Ex. 45, p. 92; 2826-28). When the strikes take place the strikers receive strike benefits and the building is picketed (2449).

In 1905 an agreement was made between the District Council in New York and the Master Carpenters' Association who purchase 70% of the trim used in Manhattan (873). It provided for union trim exclusively (2956) and was the result of a great sympathetic strike or lockout (2549). This was the first trim agreement (2552) which, like all others, was born of a great and costly conflict, and its provisions against the use of open shop trim were similar to the present agreement (Ex. Q, 2856; 2440). During the period of this agreement, which terminated about January, 1908, the union carpenters found it impossible to prevent the use of all non-union material, and an unfair list was circulated so that all non-union material except that made by concerns on the unfair list could be used (2602-5; Ex. 16-18, 531-45). This unfair list was circulated among the members of the Master Carpenters' Association for about two years (526-27), when they refused longer to recognize it (549). From January, 1908, to October 30, 1909, there existed no agreement between the master carpenters and the carpenters' union (526-27), because the master carpenters refused to insert a clause preventing the use of non-union trim and the carpenters' union refused to even

discuss or consider an agreement unless that clause were inserted (2440-4; 2571; 2608). They "always broke on the same point" (2571). A memorable meeting was held by the Executive Committee of the Arbitration Board of the Building Trades Employers' Association in February, 1909, in which defendant, David W. O'Neil, appearing for the Manufacturing Woodworkers' Association, Lewis Harding (of defendant, Lewis Harding & Co.), appearing for the Master Carpenters' Association, and defendant, Neal, and others appearing for the Joint District Council, all engaged in a stormy debate on the question of the master carpenters' refusal to make another agreement against open shop woodwork (725-61). The master carpenters claimed that the Carpenters' Union was not able to keep its agreement of preventing the members from working on any non-union trim and that it gave their competitors or independent employers an undue advantage if they were allowed to use the open shop trim. Defendant Neal said the master carpenters demanded

> "that we take radical action against the independent employer and have accused us of not doing it. This is a case where we did do it and I have a list of a number of jobs where we did it" (p. 744).

Harding rehearsed the history of the trim question and the action of his Association and said:

> "Finally they made an agreement with the Brotherhood practically to use only union trim, but they required the Brotherhood to handle only union trim for the independent employers. When the master carpenters found that the union was indiscriminately erecting this trim all over the city, they complained" (p. 751).

Harding also pointed out that when the Brotherhood found themselves unable to keep out all non-union trim

> "Foolishly the trade did enter into a proposition whereby an unfair list was recognized" (p. 751).

Defendant Neal said they tried to solve this problem by an unfair list, but

> "it worked so successfully that the master carpenters kicked it over; the organization was making too much progress. They (the master carpenters) filed thirteen complaints against us and on only one of them was the charge sustained, and the next day the business agent had the job on strike" (p. 753).
>
> "They will dig up a little job here and there that has happened to get away from us or where we have got an independent employer, but they do not go over our books and see where we have had thousands of dollars of strike pay. When this thing was working smoothly, thep kicked it over. What they want is the open shop in the tirm trade" (p. 753).

Harding insisted that the entire question should be arbitrated.

> "If the plan means anything, it means arbitration. Let us decide once for all whether the Brotherhood can handle non-union trim or whether we can purchase non-union trim" (p. 752).

Defendant Neal said:

> "We will not stand for a matter of this kind to be arbitrated where it means the open shop for half of our craft" (p. 754);

and defendant, David W. O'Neil, speaking for the union manufacturers, objected to arbitration and

insisted that the market be closed to open shop trim in order to protect the union mills from open shop competition (755, 757-58).

> "There is no way you can bring this thing around until the carpenters say, 'There are certain people that we regard as unfair and their product will not be erected in New York' * * * They must make up their minds that when they say so *not a stick of that trim shall be erected in New York*, and until they do we cannot do business" (p. 760).

Defendant Crimmins stated that the master carpenters wanted the open shop trim agreement:

> "We organize shops almost at wholesale. All this trouble is due to the fact that they tried to get rid of the unfair list" (p. 761).

At a later meeting on June 9th, 1909, defendant Neal stated:

> "We have made rapid strides * * * in cleaning up the unfair trim proposition * * * I believe that at the present time the material being erected is largely the product of the Woodworkers' Association and that speaks well for the action of the Brotherhood of Carpenters. * * * We feel that this is but another move to assist the master carpenters in establishing the open shop in the trim trade, because every case we bring here is deadlocked or laid on the table or the case dismissed and our organization compelled to go ahead and erect the non-union product" (pp. 772, 73).

The right to use open shop trim meant so much to the master carpenters that they offered to waive a proposed cut of wages of 50 cents per day if the union would remove "the ban on handling unfair trim," but the union rejected the offer 2130-31), and in February, 1909, Organizer

Bohnen reports in "The Carpenter" as to their efforts:

> "to defeat the master carpenters in their continuous attempts to force this organization into a non-union trim and millwork agreement and thereby establish scab conditions and open shop. As a further result of this action, we have succeeded in having contracts for trim aggregating nearly one million dollars in value placed with union shops" (2131).

During all this period and down to 1910 the carpenters' union was continually sending out to architects and builders, lists of union mills with the statement that they would only handle union products which must be purchased exclusively in order to avoid labor troubles (1015-23, Ex. 24-29, p. 2668).

After two years of this fighting, the master carpenters, being convinced that the union could keep out all open shop woodwork so that it could not be used by their competitors (2576-87) signed the agreement, Exhibit B, not to use open shop trim "rather than have them strike our jobs" (2586). The agreement was the direct result of the Alwyn Court strike, where the carpenters had struck against open shop material and some 20 trades had struck against the employment of non-union carpenters to set the open shop trim which had been struck against (2549). A reading of the testimony of Harding shows that each of these agreements against trim was the result of the most potent coercion and the wonder is that the master carpenters withstood the demand so long. Furthermore, the master carpenters were under bonds with the Building Trades Employers' Association to employ union carpenters and so had to come to their terms.

The understanding was that no other dealers would be allowed to buy the non-union trim in that territory.

> "No builder would feel safe that he could buy the material of a non-union concern or an open shop concern and have his building go ahead while using it" (2579).

During the previous period of two years, the master carpenters had refused to enter into such an agreement "because competing builders were using non-union materials" (2581) in Manhattan and the Bronx (2582), and if other contractors used the non-union material, which was cheaper, "they could outbid us, we could not get the business" (2582). During the first part of the period of 1908 and 1909 when the master carpenters rejected such an agreement, non-union trim was being used by outsiders, but in the latter part of the period when they yielded to avoid strikes, the work of exclusion was completed and they were protected from all competition.

> "During the first year of that period in which we had no agreement, our men were still on the road finding where they were erecting this non-union material for the outsider. Then the first part of the last year that we had no agreement, the Brotherhood of Carpenters made this claim to the Executive Committee of the General Arbitration Board, that the members of the Master Carpenters' Association were the only ones that were purchasing and erecting non-union material in the Borough of Manhattan and that portion of the Bronx and the best information that we could get was that that was the fact and therefore we —*rather than have them strike our jobs, we signed that agreement with them*" (2585-6).
>
> "*When we entered into an agreement at the end of 1909 in October, they were able*

to show us that so far as Manhattan was concerned and a portion of the Bronx, they could absolutely maintain a union trim proposition in that territory'' (2576). * * * All through the year and nine months prior to that, they had been trying to have an agreement with us whereby we agreed not to buy any non-union material anywhere for any portion of our work and we practically had that kind of an agreement prior to that with them, which they were not able to maintain, nor could we and compete with the outside people, so we refused to sign an agreement; they on their hand refused to sign any agreement with us that did not contain that clause. We gave to them as a reason for us not signing that they were not able to maintain that condition with the ousiders. They showed us within the last six months prior to that that in that section they could, outside of the members in our association, maintain substantially—only use union trim, and for that territory then we agreed with them that we would not buy non-union material'' (2578-9).

Since the agreement of October, 1909, there has been hardly a dispute about non-union trim (2603-4), although there has been no decrease in the amount of trim used (2591), and the ambition of defendant O'Neil that "not a stick of that trim shall be erected in New York" seems to have been substantially achieved. Before that time they "scrapped it out" with the union and the non-union material was in general use (2604; 2555; 2569-70; 725-81), but the complaints against the material always came from the officers and not the men (2570). The general agreement against open shop woodwork, which was the price the master carpenters paid for peace, marks the end of the complainants' trade in Manhattan. All witnesses agree that since 1910 it has been impossible to openly sell any substantial amount of open

shop material for Manhattan and the Bronx (667-71; 1273-75; 1191-97; 953-65; 447-48; 857-65; 2038-40; 255-6; 277-85; 2010-12; 1605; 1644-45).

The manufacturing woodworkers who operate union shops and are beneficiaries of this boycott are unquestionably active in stirring up strikes against open shop material in order to secure the business for themselves. In January, 1910, a few months after the master carpenters were driven into the agreement, Exhibit B, the manufacturing woodworkers made agreement, Exhibit C, wherein they agreed to employ only union men and the union agreed in effect to keep out all open shop competition by refusing to handle such materials (92, 93). One and three-eighths inch sash is exempt from the boycott because the manufactures wish to buy it from non-union concerns, but the master carpenters are bound to purchase even this from union shops (2587-88; 2607), so that the union factory may secure the middleman's profit. In 1909 defendant O'Neil was insisting that the master carpenters agree to use union material only, and objecting to the arbitration of any such question. He boldly urges the carpenters' union to take the position that "not a stick of that trim shall be erected in New York."

Neither O'Neil nor any of the defendant manufacturers dared to take the stand and explain this statement or to explain why dealers like Arnstein and Edmonds, when finding their open shop sash struck against, fled to O'Neil's office because he was influential and could arrange for them to dispose of their non-union stock on condition of signing a bond of $2,500 not to use non-union material thereafter (Arnstein, 424-33; Edmonds, 550-61). It appears that the union manufacturers are goading the union to strike the non-

union material (1262) and that one group of them at least have employed spies or detectives to trace out all shipments of open shop material, and particularly those of Paine and Morgan, with a view to driving them from the markets (1217-22; 1285-86). These manufacturers were "going to be assured that there was no Morgan or Paine doors going to be delivered in New York City" (1218), and they were going to take the matter up with the national union. In all, there are nearly 200 union mills in New York City and, while it has been their practice to purchase open shop materials from the complainants and other open shop manufacturers outside of New York, they are now forbidden to do so under their agreements with the union (319-20; 402; 510-13; 311-12; 2431-32; 2588).

Vice-President Quinn, who was actively engaged in New York City in the latter part of 1909 and the early part of 1910, in eliminating the rival union, called the Amalgamated Woodworkers' Association, from New York City and organizing the union mills which had employed the members of that rival union (2133), reports the result of his work as follows:

> "Although working on the general trim proposition as a whole, our efforts were particularly directed to reclaiming the manufacturing of sash, doors and window frames which, up to the time of signing the agreement, had been practically lost to our men. When we undertook this work, we found that, with few exceptions, practically all of the doors and window frames used in this section were made under non-union conditions. By a few well-directed movements, we speedily gained control of the frames, and I am pleased to say that at this time the old conditions have been reversed and that the win-

dow frames that a few months ago were made under non-union conditions, are now almost without exception, made in union shops and under union conditions. The door question we found a much more difficult problem, as this branch of the trade had been taken up and specialized by the door companies of the country, and particularly the large non-union concerns in the West. With very few exceptions, all of the mills in this section purchase their doors from these Western door companies and as the agreement we had made with the mills state that all trim, including doors must be manufactured under union conditions, we insisted that the conditions called for in the agreement be complied with and that all doors must be made under union conditions. In order to make this possible and to make good on our agreement, we found that it would be necessary to organize a door factory, as there was not a door shop in the entire country working under union conditions. It is true that there are a number of union mills throughout the country that manufacture doors, but they manufacture for their own use only and in conjunction with the manufacturing of other trim. They do not manufacture for the trade, with the result that up to a few months ago it was practically impossible to purchase a union made door in the open market, the large non-union door factories in the West controlled this market absolutely. We realized that in attempting to organize door shops to compete with the non-union concerns, that we were undertaking a very difficult task, but thanks to the energy and perseverance of General Organizer Cook, who undertook the work of organizing the door shops and who was compelled to make several trips to Milwaukee in order to accomplish the end in view, an agreement was signed in this city by General President Huber with the first union door shop in the country. Later on, he succeeded in making an agreement with a large manufacturing com-

> pany of Vermont for the manufacturing of doors exclusively, with the result that we have to-day two door factories employing union men and manufacturing doors under union conditions for the New York market. * * * Although much has been accomplished in the work of organization during the past six months, the work is still being pushed as aggressively as ever. General President Huber has assisted in every possible way, as he realized the magnitude of the work in which we were engaged. * * * The result of our work I estimate to be a gain of membership of about 3,000 members and the organizing of 40 mills that before were working under non-union conditions" (2134-36).

In the summer of 1910, the Empire Door & Trim Company, a customer of one complainant, was coerced by strikes to sign an agreement not to use non-union sash (pp. 300-333), and the Van Nest Woodworking Company, a manufacturer, was obliged to sign an agreement under penalty of $1,500, not to use non-union materials which it had been purchasing from the complainants (495-512). In January, 1911, three dealers in open shop sash, all of which were customers of the complainants, were each coerced into signing an agreement under penalty of $2,500 not to use non-union sash over 1⅜-inch thick as a condition of their right to dispose of a valuable stock of open shop material they already had on hand (424-445; 550-567; 682-700). Each of these agreements, like that made by the Master Carpenters' Association, was the result of the most potent coercion of the same character and was the price paid for peace and protection against costly industrial warfare.

On December 31, 1910, General President Huber officially reports to the United Brotherhood as follows:

> "While it is true that we have not had

> many strikes of a serious character during the past three months, we have had a few where only one or two concerns were affected, and especially is this the case in New York City, where I have had a corps of organizers attending to the mills, assisting the district in organizing them. This work has now been going forward for practically a year and we now have full control of the situation" (2144.)

In March, 1911, General President Huber makes a further official report published in "The Carpenter", in which he says:

> "The organizing work has gone on with good success, considering the conditions throughout the country. Among the millmen we have been more successful than we expected. Good work has been done along that line and the actions of New York City on the proposition of not handling non-union material has had the effect of mills being unionized that was impossible to organize heretofore. May the good work be kept up until all mills are unionized and enjoy the conditions we are striving for" (2143).

The conditions in Manhattan and the Bronx at the time of commencing this suit may therefore be summarized as follows:

It is impossible to conduct building operations except upon the closed shop basis in all trades, for the employment of a non-union man in any trade would result in a strike of all trades instituted by the Building Trades Council.

The union carpenters by a system of coercive rules prevent their members handling open shop woodwork and through their compact with more than thirty other building trades' unions, prevent the employment of any non-union carpenter to install the open shop materials which they refuse to install.

From 1907 to October, 1909, the Master Carpenters' Association refused to restrict themselves to union materials because their competitors were using open shop materials which cost less, and the result was a continuous fight and series of costly strikes over this entire period.

In October, 1909, when the master carpenters attempted to use open shop material on the Alwyn Court building, the union carpenters struck and over twenty trades were called out in sympathy when non-union carpenters were employed to install the open shop materials. At the same time, the carpenters' union demonstrated that it could and would exclude all open shop materials from Manhattan and the Bronx, so that the master carpenters need not fear competition on the part of other builders using such material. In view of these conditions, the master carpenters made the agreement, Exhibit B, not to use open shop material in order to avoid strikes on their jobs. This agreement is enforced by penalties through the by-laws and constitution of the Master Carpenters' Association on the one hand (Article VII, Sec. 1, Ex. L, p. 2876; Article I, Sec. 7, Ex. L, p. 2868), and the by-laws of the union on the other hand. This agreement is calculated and intended to restraint trade and commerce and has had that intended effect by substantially ending all trade in the boycotted merchandise within the restricted territory. The *motives* of the master carpenters and the union in signing such an agreement may have differed, but the *intention* of each was to end trade in the open shop merchandise in violation of law.

Dealers and small manufacturers who were regular purchasers of open shop material have signed written agreements never to purchase those materials in future under a large forfeiture.

The union manufacturers have signed agreements to employ union men on condition that the union shall protect them from open shop competition by refusing to handle the open shop materials.

Both union manufacturers and the union employ spies to vigilantly trace all shipments of open shop material, so as to inspire strikes upon the buildings where they are used with a view to securing the business exclusively for union mills. These strikes are enforced by fines, the payment of strike benefits and the employment of pickets.

Because of this combination, all open shop products have been driven from the markets of Manhattan and the Bronx since October, 1909; all competition between union and open shops in that market has been strangled, and the union manufacturers through their monopoly are able to force their higher-priced products upon the New York public.

Attack on Brooklyn.

After the defendants had succeeded in excluding all non-union material from Manhattan in the early part of 1910, they proceeding to initiate an elaborate crusade against non-union woodwork in Brooklyn for the purpose of extending the Manhattan conditions to that Borough, where the complainants still had valuable trade. Up to that time open shop woodwork was worked upon by union carpenters without objection in Brooklyn (1067-68; 1583; 1266; 284-5; 2626; 2586-7), but in March, 1910, Organizer Cook announced he was ready to go to Brooklyn (Ex. 45, p. 119), and it was arranged to start the campaign with a mass meeting. Among the complainants' principal customers in that Borough were the manufacturers

Albro J. Newton Co. (919-20), Louis Bossert & Son (1601-02), John S. Loomis Co. (915), Hardy, Voorhees & Co. (916-17), and Cross, Austin & Ireland Lumber Co. (707-10). Since the first step in organizing these customers, so they would operate closed shops and not deal in open shop materials from the complainants, was to compel the builders of Brooklyn to stop purchasing non-union trim, resolutions were passed at the 1910 convention of the United Brotherhood as follows:

> "Whereas, about 2,500 new members have been added to our organization through a movement inaugurated against the Amalgamated Woodworkers and against unfair trim in New York City, and
>
> Whereas, there are still some large unfair mills located in Brooklyn, New York, be it
>
> Resolved, that the general office be authorized to finance and carry on a campaign of organization until the efforts are crowned with success" (2221).

In the month of September, 1910, certain of the defendants called upon Hilton, the secretary of the Brooklyn Builders' Association, which has about 100 members (875) and stated "that a number of builders were handling what is so-called non-union trim and they expected that there was going to be trouble over it" (876). A second visit was made a few days later by Erickson, Wolfinger and Rice in which they stated "they were going to unionize the different mills in the Borough of Brooklyn and requested the assistance of the Builders' Association" (877, 878); that "there were two delegates on to New York at that time and there would be some more in this work of unionizing these mills" (878); that "there was going to be trouble on account of unfair trim and mentioned the names of Albro J. Newton, John S. Loomis Co., Cross, Austin & Ireland,

and Louis Bossert & Son" (878). Less than a week later the Builders' Association received a third visit from defendants, Neal, Erickson and others, who stated that strikes had been called upon the jobs of the members handling the non-union trim of the Newton Co.; "that after they had gotten his mill in line they were going after the Loomis Co., then after Cross, Austin & Ireland, then after the Louis Bossert & Co. mill" (879-80) and the other mills (786-89; 794; 808; 902). It will be noted that the same methods were to be employed as in Manhattan, of singling out manufacturers because of the impracticability in the first instance of striking all non-union material at once. After these strikes were called against all members of the Builders' Association handling the Newton material, the union demanded an agreement against the use of open shop woodwork, and arrangements were made for a meeting between the Carpenters' Union and the Arbitration Committee of the Builders' Association looking for an adjustment, "the outcome of which was that the men were to be returned to work on the different jobs; in the meantime the Builders' Association would call a special meeting to decide whether or not they could enter into an agreement with the carpenters' organization whereby all members would use nothing but union made material" (882-83). The secretary of the Brooklyn Branch of the Carpenters' Union thereupon addressed a letter to the secretary of the Builders' Association under date of October 1st, 1910, as follows:

> "As per our understanding with Committee representing the Association, and their request that our organization return our men with the proviso that the question of non-union trim be taken up by a joint committee of both associations with a view of reaching

a probable solution of same in order to avoid strikes on the several jobs of the members of the Brooklyn Builders' Association in future.

"I am directed to inform your committee that the request has been granted and our men are ordered to man the several jobs on strike at present with the understanding that we reserve the right to take action if the negotiations of the Joint Committee is not satisfactorily adjusted" (883-84).

Before this special meeting was called, an injunction was obtained by the Albro J. Newton Company which prevented the builders from signing any such agreement (883-4) and they so advised the Union (893-94).

During this attack on the complainants' customer, Albro J. Netwon Co., eight or nine jobs were struck (906), and the only man who refused to strike on these several jobs was William R. Rogers, who was fined $25.00 for disobedience under Section 56 of the by-laws of the Joint District Council (Ex. 38, p. 2680), and was subsequently expelled for non-payment thereof (614-21). On all of these buildings the men were anxious to remain at work and only struck because of the delegates orders (634; 1081; 1089-90; 803-4; 817, 903). The builders were regular customers of Newton and had always employed union carpenters who worked on the non-union material without objection (905).

All of these strikes against the Newton material, because it was non-union, were part of a general scheme, under the direction of the United Brotherhood, conducted by out-of-town organizers (1089-90) in the employ of the Brotherhood at Indianapolis, like Rice and Wolfinger, for the purpose of driving all non-union material from

Brooklyn (813-16), and the concentration of attack on Newton was but a matter of expediency to accelerate the ultimate aim at monopoly as in Manhattan (794; 808). The details of some of the building operations which were struck are in the record and show that they were large operations attacked on the same day (920; 879), months after the material was contracted for when half of the boycotted material was installed and a part was still undelivered and unpaid for (Maguire, 783-815; Norris, 818-29; Bush, 1072-90; Martin, 900-907; Rogers, 614-26; Allen, 909-11). On four of these jobs at least part of the material struck against was the material of the Paine Lumber Co. (921). Through the injunction obtained by the Newton Company, its business increased (925) as well as its purchases from the complainants Paine and Morgan (925).

In October, 1911, a further step was taken in the avowed campaign against non-union material in Brooklyn and a concentrated attack was made against the complainants' customer, Louis Bossert & Son, in the same way that the Newton Company had been assailed a year before. They watched Bossert's shop to find out where the goods were being sold and a good many of their jobs were stopped (1265). Several large and valuable customers of the Bossert Company had their building operations in Brooklyn struck at the same time and were only allowed to renew the work by signing agreements which provided in substance "We agree that we will not use non-union trim in the future if this job is not stopped" (Gough, 943-47; Beckmann, 1023-31; 1260-65). These agreements were signed under the same duress and exigencies as the Master Carpenters' agreement, Exhibit B, in Manhattan, and as soon as

they were signed the union carpenters were allowed to return to work without objection. In each of these instances, as in the Newton case, the building operations were stopped at the most critical moment when they were half completed, and months after the open shop materials had been contracted for. In all of these cases, the men were willing to work and were ordered out by the delegates (1025; 1051-53).

We will now show with what effect this combination was directed against the business of each complainant.

W. D. Crooks & Sons is a Pennsylvania corporation with factories at Williamsport, Pa. (950).

The company employs about 100 persons, and operates an open shop without discrimination against union men (951), but some of the employees refuse to join the union because they have already had unfortunate experience with it (986). Its annual sales are about $200,000, of which 90% is doors and over one-half are with customers outside of the State of Pennsylvania (951-52). $70,000 to $80,000 worth is sold annually to customers in the State of New Jersey (952). Its business in New York City through its resident salesman differs from the other complainants because it sells directly to builders (954, 1197), and for this reason it has had direct contact with the defendant builders, while the other complainants have not.

Defendant Cook called on the company at Williamsport in the Spring of 1910 and told the Secretary that unless he unionized he could not put a dollar's worth of goods into New York (956), saying: "You unionize or stay out of New York"

(985). He further added that the New York closed conditions would soon extend "all over the East" (994); "that they were endeavoring to unionize the territory between New York and Washington" (994) and "in a short time the Eastern territory would be closed and we could not sell our *goods any place* and that we should get in out of the wet early" (1007). *Cook does not contradict this statement.*

In order to accomplish this end the more effectively the union had blue prints made of the construction of the Crook's doors so they would be able the more readily to detect them (968) and these blue prints are posted in the unions (1009).

The effect of the defendants' combination on the business in Manhattan shows to what extent the defendant Cook has made good his threat.

Because of the appointment of a local agent in October, 1907 (954), and the fact that the concern was little known in New York City up to that time (1213), the business in that City did not really commence until 1908 and increased up to the time that the defendants' combination interfered in 1910 (980-81). The actual sales of the company in New York City have been as follows (952-53):

1907	$ 1,600
1908	10,125
1909	25,846
1910	26,524
1911 (first 6 mos.)	14,627

The defendants' combination ended the Manhattan business in the middle of 1910 (966; 1192), for practically all of the 1910 business which went

into the restricted territory of Manhattan and the Bronx was secured during the first six months of 1910 (955). None of the 1911 sales were made in the restricted or closed territory from the Battery to 177th Street (953), but sales were made in the open territory, such as Brooklyn, Yonkers and New Rochelle (953-4). Prior to 1910, the concern daily received lists to estimate on contracts in Manhattan and the Bronx, but since August, 1910, practically no lists have been submitted (956-57), because the customers are afraid (1201-2). Many of these customers state that they prefer to buy Crooks' doors, but cannot do so in the restricted territory (962-65).

In December, 1910, a strike was called on Rector's Hotel (1968-1970), because of Crooks doors, which had been sold through G. W. Smith & Co. of Philadelphia (1967-68), and as defendant, Thompson, Starrett & Co., the builders, were members of the Master Carpenters' Association, the dispute came before the Trade Board of that organization and the carpenters' union (1971-72), where it was adjudicated that the Crooks doors were non-union and could not be used (1973-78). It was then necessary to effect some settlement with the carpenters' union (1976-77), as there were 1,100 doors, worth about $18,000, and arrangements were made with the union defendants to remove them from the building and after going through the work of partially taking them apart, to reassemble them, and put them back on the building (1978-79). In this way the strike was settled and the builders made deductions from their bills for the doors on account of this wasteful and needless labor (1991-94).

Prior to the interference of the defendant combination, at least $1,000 worth of Crooks doors

were sold annually by their agent to defendant, C. W. Klapperts & Co., for use in Manhattan (1188-89), but this customer has refused to do business since the Summer of 1910 (1190), because the goods are not union made. Several thousand dollars' worth of Crooks doors were also sold annualy to H. W. Palen & Sons until the Summer of 1910, when they refused to do business for the same reason (1190, 957-9), although the doors were cheaper than union ones (233), and at least $1,000 worth annually to H. H. Voigt & Co. until the Summer of 1910 when that customer refused to buy for Manhattan business on the same ground (1191-2). "They tell me they cannot use my stuff on the Island of Manhattan on account of it being 'non-union' " (1192). Crooks formerly did a business of at least $1,000 annually in doors with Zimmerman, but has lost that business since the middle of 1910 for the same reasons (1193-4). Among the various customers that have refused to purchase Crooks doors because they were non-union and objected to by the union defendants, are the following defendant builders (1195-97):

Walter M. Collins (1193), E. J. Hantsche & Co., R. H. Casey, W. E. Smith, Inc., Watt & Sinclair, Inc., Leopold Kantor, Geo. L. Hiltl, Co., Jones Construction Co., Edwin Outwater, Frank H. Rush, Pottier & Stymus, James MacArthur Co., James Elgar & Co., Hugh Getty, Inc., Charles A. Cowen & Co., Jennings & Welstead, A. G. Imhof, Louis Mader, Donald Mitchell, F. T. Nesbit & Co., John H. Parker Co., Howard J. Smith & Son.

Prior to the middle of 1910 none of these concerns ever raised the question as to whether the goods were union or non-union (1192), but since then they have been afraid of "a general strike on

the buildings" (1199) if they bought Crooks doors, though some customers who are afraid to receive estimates for Manhattan work purchase goods for outside boroughs (1201-2) so that outside of Manhattan the business is as yet unaffected(1205). In spite of this condition depriving them of Manhattan business, the popularity of their merchandise is shown by increasing business in Brooklyn, Queens and Staten Island (967), where the union carpenters are erecting their open shop materials (967-68).

If this Court cannot grant relief this combination will continue, until it has driven the complainant from Brooklyn and the other markets of the East, as threatened by defendant Cook, and already accomplished in Manhattan. The granting of relief must open Manhattan and all other markets to their trade on a fair competitive basis.

Gould Manufacturing Co.

This complainant, which has its factories at Oshkosh, Wisconsin, employs about 150 men on the open shop basis and has invested in its business about $350,000 (1895). It was visited about January 30, 1911, by certain men who represented that they came from the Carpenters' Union (1895) and who asked that the mill be unionized, stating that "we would have less trouble in disposing of our goods, etc., if we had the union label" (1897). The concern sells about $450,000 annually, of which $300,000 is sold to customers outside of the State of Wisconsin (1897), and its sales are subject to acceptance and approval at the factory (1897). It has a New York agent and its business in New York City in 1909 was $36,000, while in 1910 it grew to $83,000 (1898), of which $57,000 was in 1⅜-inch sash (1911). In 1910 $26,000 worth of this business was in 1¾-inch sash.

One of its principal customers was Thomas C. Edmonds & Co., of New York City, to which it sold $20,000 worth of material in 1909 and $28,000 worth in 1910 (1902). This was the jobber of sash who signed the agreement, Exhibit 19, in January, 1911, agreeing not to handle any non-union sash in the future above 1⅜-inch thick under a penalty of $2,500 (550-58), in order to dispose of a large quantity of Gould sash which it had on hand. This customer testified that he stopped dealing with Gould in the 1¾-inch sash "because we have been forced into an agreement which provides that we cannot sell anything but union sash 1¾-inch thick" (581).

Another valuable customer of this complainant was Arnstein, to whom the concern sold $14,000 worth of material in 1910. Under date of December 19, 1910, the said Arnstein wrote this complainant a letter (Exhibit 6—1902-3), in which he said:

> "I believe it will be necessary for your concern to make some arrangement to unionize part of your shop or use some other method whereby the local carpenters will recognize you as a union shop if you intend to hold the Eastern market for 1¾" sash. * * * Is there any posibility of your helping me out with the car now on the road, as they will otherwise be a total loss to me for the Union refuses to handle these sash unless I can prove that they are union made."

This is the same Arnstein who signed the agreement, Exhibit 9 (424-427), in January, 1911, not to purchase any non-union sash over 1¾-inch thick under a penalty of $2,500 fine (428-29). Up to that time he had never had any difficulties with the use of non-union material and at that time he had a contract on hand with the Gould Mfg. Co.

for about $4,000 worth of sash (428-29). When he had trouble disposing of the non-union sash, he consulted defendant, David W. O'Neil, and O'Neil arranged for him to meet the officers of the union, which resulted in said agreement (429-31). The agreement was signed in order that Arnstein might dispose of the non-union sash which he already had on hand and avoid future trouble (438). Since that time he has refrained from purchasing any 1¾-inch sash from the Gould Mfg. Co. on account of said agreement (439), although much of his business with the Gould Company had been in this material (1487).

In Brooklyn this complainant sells Louis Bossert & Son, Hardy, Voorhees & Co. (1898) and Parshelsky Bros. (1899). Its business with Parshelsky Bros. in 1910 was $22,000 (1899) and part of this was 1¾-inch sash. On or about May 24, 1911, it received a telegram from Parshelsky stating "We are losing considerable orders. The carpenters do not hang your heavy sash" (1899, Ex. 3), and on June 2, 1911, he received a further telegram (Ex. 4) stating:

> "Our customer still refuses to hang your sash. Am communicating daily with Mr. Merritt. Every large sash house that handle thick sash have signed agreements except us. Why should we make this fight single handed?"

On July 2nd it received a further letter from Parshelsky Bros. (Ex. 5, 1901-2, 1936), in which they said:

> "It seems that the lawyers in New York cannot do anything. The carpenters refuse to hang the sash and the builders refuse to accept the same under these conditions."

The difficulty which Parshelsky Bros. had in having certain 1¾-inch sash from Gould installed

upon a building in Manhattan is set forth at length in the record (1521-25). The strike against the Gould sash in Manhattan came before the Strike Committee of the Joint District Council (2371) when the builder appeared and said:

> "In future all his work would be given to a sub-contractor that was purchasing his material from a factory operated by our men" 2371);

and the committee agreed on this condition, that the "sash could be hung" (2371) and stated they "were willing to get the men to put in the sash" (2372). They therefore told the men "that the committee decided that they had to hang those sash," which the men did (2372) after a delay of a month or more. The general attack against Parshelsky Bros. and the strikes resulting from it in order to compel that customer to abandon the use of all open shop material in future, are set forth in the record at length and show the injury that was inflicted upon that jobber's business because he handled open shop material (1523-57; 1583-91).

Paine Lumber Co., Ltd.

This company has all its factories in Wisconsin (1596) and has several million dollars invested therein. It employs 2,000 or 3,000 hands (1596-97) including a great many union men (1659) and operates an open shop without discrimination against union men (1598-9). In February, 1911, it was visited by delegates of the carpenters' union who told them they would have trouble selling their merchandise in New York City unless they unionized and that the union organization was so far-reaching that the same trouble would extend to all other places in the country

(1886-88). The annual sales amount to $2,500,000 and nine-tenths of them are with customers outside of Wisconsin (1599). These sales are made through traveling and local salesmen subject to approval and acceptance at the factory (1600). Local salesmen and sales offices are maintained in New York, Philadelphia and Chicago (1600), and its annual business in the larger cities is divided as follows (1600-1):

Business with Philadelphia customers,	$200,000 to $300,000
Business with Chicago customers,	300,000 to 400,000
Business with Boston customers	200,000
Business through New York office, covering Greater New York, part of New Jersey and Connecticut, Rhode Island and Massachusetts,	700,000

The sales in New York City are made principally to dealers rather than contractors and the term "dealer" includes such manufacturing customers as Albro J. Newton Co. and Louis Bossert & Son, of Brooklyn (1601). Its business on Manhattan Island with M. F. O'Neill, H. Raabe & Son, F. T. Nesbit & Co., and City & Suburban Homes Co. ended about August, 1910 (1602-5) on account of the defendants' combination.

Its Manhattan sales are as follows (1605):

1906	$190,000	
1907	75,000	
1908	50,000	
1909	50,000	
1910	50,000	
1911 (6 mos.)	11,000	(½ is 1⅜-inch sash)

This falling off is due to union conditions and but for the union interference the business would have increased above the $190,000 mark, which was the annual business in 1906 (1607-10), at the time the boycott first began.

The concern has also lost all business with such customers as Arnstein (1485) who was coerced into the penal agreement not to buy open shop sash (428-38) and Edmunds (555) who signed a like agreement (552) and also Werbelovsky (704; 684-6).

Its important customers, Parshelsky Bros. (1520-21) and Hubbell Hardwood Door Co. (1344-45), a manufacturer in New Rochelle have also had serious difficulties because handling their goods.

Parshelsky Bros. are jobbers in Brooklyn (1519-20) doing a yearly business of about half a million dollars, of which 2/3 is in doors, sash, blinds, etc. (1520). These materials are purchased from complainants Paine, Morgan, Gould, and Bristol, and the annual purchases from Paine alone are $60,000 (1521). In the Spring of 1911 the defendants struck a building where he was furnishing sash from the Gould Co. and attempted thereby to compel him to sign an agreement like Werbelovsky and Arnstein and one Friedlander, not to use open shop sash (1522-23). He told them that he was unable to execute such an agreement on account of existing contracts which he had with Paine and Gould (1523). They told him he would be sorry for it if he did not sign the agreement (1525) and since that time he has been unable to dispose of complainants' materials in Manhattan because the customers are afraid to buy (1525-26). Prior to 1911 he had never ex-

perienced trouble in Brooklyn (1583-84; 1500), but the defendants began to attack him in Brooklyn in 1911 and told him, "we will make trouble for you on every job in this town" (1528). So they struck one job after another where the builder used Paine doors purchased of Parshelsky (1526-32; 1559-60) because the materials came from Paine (1496-97) and made the builders agree to purchase only union material in the future (1497). The striking carpenters say "we want to go to work, but if we go to work we will be thrown out of the union and fined" (1530); 1557), and this is also what they told their employer when asked to go to work (1499-1500). There would be no difficulty getting the carpenters to work if the officers would leave them alone (1556-57). In the mean while the non-union material of other concerns is being erected in Brooklyn by union carpenters without interference (1585), but the strikes against this customer of Paine's has produced a condition where customers state "They cannot use any material that is bought from Parshelsky because he deals in unfair material" (1529).

Hubbell Hardwood Door Co. was also a regular customer of Paine and has had a number of jobs struck where it was furnishing Paine material. One job at 167th Street where the Paine doors were used (1346-50) was struck by defendant Donovan, who says they "quit work because they were ordered to quit work because they did not want them to hang the doors, that was all" (1355). When he heard that graft money was being paid the delegates to settle the strike he thought he ought to have a share of it (1355-56). The Paine doors were also furnished by the Hubbell Co. for

a building at 151st Street (1358) and though the building was struck before the doors were delivered (1359-61) they later "voted to call the strike off less the hanging of the doors which they did and instructed Mr. Nylund to order the men back to work" (1362). Negotiations were carried on to try and arrange for a settlement so that the doors would be hung (1363-64), and the Hubbell Co. submitted a list of 12,000 Paine doors (1364) of the value of $35,000 (1365) to the union officers at headquarters and agreed not to purchase any in the future "if they would allow us to use a certain portion of this list of doors in the New York market" (1365), but "they one and all agreed they did not want us to hang the doors" (1365), "one stated that if he had his say he would not let us hang a one of them" (1365-66) and they decided "they would not allow us to hang the doors" (1366). The other material was not objected to but they had to store those doors and buy new ones (1368).

On the *Albert J. Schwarzler* job where 350 Paine doors were being used they also had a strike (1389-90). Defendant Anderson said to the builder, "When they come to hang the doors there will be trouble on the job. You had better see the Hubbell people and try to take the contract away" (1096). There could not be any doubt about the union character of the Hubbell Co., which was certified to by the official representative of the Brotherhood (Ex. 32, p. 2668; 1101), so that the only trouble was on account of the Paine doors. Defendant Anderson ordered the men out before the doors were delivered (1449; 1884-85); 1913, 1914), and stationed a picket on the job (1915-16; 1186). The men received strike benefits and (1914) were out two or three weeks hanging about

the job (1446-48). They were afraid to return to work because of the delegates' orders, although they wished to do so (1102-03; Ex. 33; 1164-5; 1446). Later when contempt proceedings were started for violation of the preliminary injunction herein the men were told they could go back to work and gladly did so (2282). Much of Anderson's testimony for defense is unreliable, as will be found by comparing his original testimony with that which he gave when recalled by complainants.

In Long Island City a strike was called against Paine doors in 1911 and the doors had to be abandoned, although all other doors on the job which came from the non-union Bossert shop were used without objection (1058-1063).

The Albro J. Newton Co. (919-24) and Louis Bossert & Son, large open shop manufacturers of trim in Brooklyn, are valuable customers of the Paine Co. (920; 1601-02), and if the onslaught on the business of these two customers, for the purpose of unionizing them and excluding open shop material from Brooklyn succeeds this market will be cut off like the Manhattan market.

This complainant has been driven out of the Manhattan market, where union manufacturers are seeking to "stop Paine doors coming into this market" (1283-84), and is in imminent danger of losing such valuable customers as Parshelsky Bros. and the Hubbell Hardwood Door Co., and of being driven out of the valuable markets of Brooklyn and Philadelphia by the same methods.

Morgan Co.

This company which has its factories at Oshkosh employs 600 persons on the open shop basis without discrimination against union men and

has over a million dollars invested in the business (1759-60). In January, 1911, just before the commencement of this suit it was visited by three representatives of the Carpenters' Union (1760), one of whom was Bunke (1760), official business agent of the United Brotherhood (2632). This committee requested the company to unionize and said:

> "If we did unionize our shop that we would be in a position to market our goods in New York, that we were now barred from that market and that we might expect in the near future to be barred from other markets. They specifically named the cities of Philadelphia and Boston. We would be barred from other markets under the same conditions which were existing in New York, namely, that the union men would refuse to put up our goods because of their not being union made" (1761).

The concern sells about a million and a quarter of goods a year, 80% of which is sold to customers outside of the State of Wisconsin (1762), subject to approval and acceptance in Oshkosh (1762). Its annual business in Philadilphia is $100,000 and in Boston $35,000 (1762). It has a New York office and local salesmen covering the near towns of New Jersey and New England (1763) and its sales through this office are as follows (1763):

1908	$47,000
1909	95,000
1910	89,000
1911, up to August	21,000

The drop in their business in Manhattan began in September, 1910 (1774) because the builders were afraid to take the non-union goods (1778). The Manhattan sales in 1909 were about $20,000, in 1910 about $10,000 (1288) and by the year 1911 it had ceased entirely (1272). Prior to 1910 there

had been no difficulty of this kind (1772-73; 1280). Among their customers on the Island of Manhattan who have stopped purchasing from them are Van Nest Woodworking Co., Empire City Woodworking Co., Bronx Sash & Door Co. and some large builders (1272) like H. Herrman Lumber Co. (1767) and defendants C. W. Klappert's Sons, F. T. Nesbit & Co. and Patrick Gallagher (1786-7) and these concerns and the trade generally refuse to buy now because the materials are non-union and the carpenters would not erect them (1273-75) (Ex. 34 and 35, pages 2670-71; 1293) and they state that it would be useless for the company to submit estimates (1279). In the early part of 1910 an experienced salesman was specially employed to sell merchandise for them in Manhattan and the Bronx (664-69; 1769). He solicited about fifty builders and not one would give him a chance even to figure (667) because the material was non-union (668-71). Thompson-Starrett Co. said they would be pleased to have him figure, but were afraid their work in Philadelphia, Boston, New York and everywhere else would be stopped if they used the non-union goods (667). Prior to this time he had never experienced difficulty in selling non-union materials in New York (675-8).

The sales to the Van Nest Woodworking Co. of the Bronx were:

1909, $15,000; 1910, $33,000; 1911, $112;

and this business was entirely cut off by a strike of the 75 men in the factory of this customer, which compelled it to sign an agreement not to use non-union material under a $1,500 penalty as a condition of allowing them to dispose of the Morgan doors which the customer had in stock (Ex. 12, p. 500) (1932). The experience of this

customer, which is well established by the evidence (504-515) is summarized in its letter to the Morgan Co. under date of August 17, 1910, as follows:

> "United Brotherhod of Carpenters and Joiners of America called our men out in strike on account of using your doors. They have advised us that they will not allow any of their men to work in our shop if we handle any more non-union material. In order to r e-open our factory and go on with our work, we had to agree to forfeit $1,500 to them if any non-union material is used. This of course means that we cannot purchase any more doors from you unless you unionize your shop and thus make union doors" (Ex. 11, p. 498) (1933).

The carpenters themselves had no objection to the non-union material. They were not obliged to work on it and besides knew it came from Morgan (513-15, 507). They simply quit work on orders of the delegate (504-5) and returned on order as soon as the agreement was signed (509). By the terms of the agreement the concern then became a party to agreement, Exhibit C, with the other manufacturing woodworkers (509), but "was anxious to still buy doors of them because I could buy them very cheap" (511).

The *Brooklyn* business of the Morgan Co. which runs form $30,000 to $75,000 a year (1271) is also endangered by the general attempt at monopoly in that Borough. It sells about $2,000 of doors annually to the Albro J. Newton Co. (920), over a thousand dollars a year to Hardy, Voorhees & Co. (916-17) and $15,000 to $40,000 a year to John S. Loomis Co. (915), all of which are open shop manufacturers in Brooklyn against which defendants have threatened and are making a determined attack. Parshelsky Bros., large jobbers

of open shop woodwork in Brooklyn, who are being attacked, are also customers (1520).

This concern, therefore, which has been driven out of Manhattan, is in danger of losing the Brooklyn market, and markets in other parts of the country like Philadelphia.

Bristol Door & Lumber Co.

The factories of this company are situated in Bristol, Va., where it has invested $125,000 to $150,000 and employs about fifty men upon the open shop basis (1998). Its annual sales are about $250,000 and nearly all of these are to customers outside of the State of Virginia. The company has a local agent in Philadelphia, New York, Springfield and Boston, and all of its sales in New York are made to local mills (255), subject to approval and acceptance at the factory (2000). Its annual business with customers in New York and vicinity, which includes sales in Northern New Jersey, Brooklyn, Richmond, etc., was $45,000, of which $23,000 was to customers in Manhattan and the Bronx (2001). Its Philadelphia business is larger (2008). In 1910 its customers in the Manhattan and Bronx district were Van Nest Woodworking Co., Empire Door & Trim Co., and William Klein. Its business with the Empire Door & Trim Co. in 1910 was about $10,000; with William Klein about $2,300; with the Van Nest Company $7,700 (2000), and all this business ended that year on account of the defendant's combination (2002; 2010-12; 277-85). It does not sell a dollar's worth of goods in Manhattan now, while formerly it sold $25.000 annually (2038-40). In September, 1910, the Empire Door & Trim Co. wrote them as follows:

> "The expected has happened. We have received a call from the delegate of the Carpenters' Union here in this city, he having heard that we were buying trim from you. We are now brought face to face with a condition of great danger to our peace of mind. The unions are in a position to shut us up tight if so disposed, or if our competitors take the mater up which they certainly will do if informed. * * * We hope our business some day will take all the trim you are capable of manufacturing, but at the present time if you can arrange matters with the union you can easily dispose of large quantities" (2003-4)

The same company also wired the Bristol Door & Lumber Company to "stop all work on our orders" (2005) and then wrote that

> "the material cannot be used in this city under present conditions; we do not intend to repudiate our orders, but as all labor on this material will be a total loss, we wish to minimize the loss. * * * Do not ship us anything until further notice and oblige" (2006).

The Empire Door & Trim Co. also told this complainant that they could not purchase any more of its goods, although the merchandise was satisfactory (2007) for they had been obliged to store the last goods purchased on account of strikes called against them (257-60). This customer had an agreement, Exhibit 7, which was also like Exhibit C and forbade the purchase of open shop articles and the factory was struck because of these purchases. The Bristol goods were partly made over by union men and partly placed in storage as a condition of calling the strike off (311-17).

In August or September, 1910, the Bristol Com-

pany also sold goods for the P. J. Groll Construction Co., to one William Klein, who operated the Tremont Molding Mill. Klein had a strike in his mill on account of these goods (397-400) and has since refused to buy any further materials, because he signed agreement, Exhibit 8, with Simpson and Donovan, which is the same in form as the agreement, Exhibit C, forbidding the purchase of non-union material (399-402). At this time he had another contract outstanding and they told him: "I could not go on with that job unless I joined the union" (401). Up to this time Klein had bought his materials in the West and had never had any difficulties because it was non-union and had never known of this distinction (408), but in this instance defendant Donovan ordered a strike in his factory where the men were receiving union wages (404). The difficulties on the Groll job, where the Bristol material sold by Klein was struck against, were testified to at length.

Defendant Storey came to the building and wanted to know where the trim was coming from, stating "that he was under the impression that it would not be union trim and if such were the case he would have to object to the same thing placed and put in the building which would involve him in a strike" (1454). Simpson came and said that if the trim was non-union "they would be forced to call a strike in order to conserve their interests with the agreement which they held with the boss carpenters' association" (1455). When the builder found that the stuff was non-union and he was facing a strike, he went to the headquarters of the carpenters' union and told them he was not responsibl nd they replied "they were very sorry, but they had an agreement with the

boss carpenters' association which compelled them to use nothing but union trim and would not permit their men to use anything but that" (1456). They informed me that if I put up this trim they would be compelled to call a strike" (1457). The trim was delivered on a Saturday and on the following morning Storey struck the job. Although the men wanted to remain at work (349; 373-4), they were afraid of being fined (370-74). The carpenters were not willing to go to work and take a chance of being hauled over the coals for it (1459). On the following day, some non-union carpenters were secured (1459). Storey said he would take it before the Building Trades Council and inform them of the fact that I had non-union men there and ask the assistance of the other trades in consequence thereof (1460). At that time there were 10 or 11 different trades working on the building (1460-61) and they were interfered with to considerable extent, one or two of them actually striking (1462-68; 346-50). The building was finished with non-union carpenters and the other trades working also (1469) because they dodged the orders of the Building Trades Council (1470). There was difficulty getting non-union carpenters (1473) because the non-union ones were poor mechanics (1477). The builder was damaged many thousands of dollars (1475) and deducted $400 from the price of the goods on account of his trouble (1469). The builder said, "It put a crimp into me financially" (1476).

About the time the Bristol Company was having these troubles, Orangizer Simpson called on their salesman and said: "I would have to have union mills if I intended to sell goods in New York; that after they had finished with New York City, they were going to Brooklyn" (267-68),

where the company had an annual business of $40,000 (255). As yet the Brooklyn business has not decreased, showing that the merchandise and trade conditions were otherwise satisfactory (284-5), but one of their customers is Parshelsky Bros. of Brooklyn, who is being specifically attacked for selling open-shop material (1520).

R. McMillen Company.

This complainant, which has its factories at Oshkosh, employs about 300 hands on the open shop basis without discrimination against union labor and has about $250,000 invested in the business (1834). It was visited in January, 1911, by two men who represented themselves as delegates of the carpenters' union and asked that the factory be unionized, stating that it would help the concern in disposing of their products if they did so (1835). The concern sells about $750,000 annually, 85 to 90% of which goes to customers outside of the State of Wisconsin (1836). Its annual sales in Philadelphia are $30,000; Boston, $25,000 to $35,000 (1836), and in Chicago about $35,000 (1836-37). Its business in New York City and vicinity through its local salesman and sales office (1838), is as follows (1837):

1908	$100,000
1909	200,000
1910	180,000

These sales which are 85% doors are made primarily to dealers, including local manufacturers, and not to contractors (1838). Its sales to the Empire City-Gerard Co. formerly were (1838):

1907	$27,000
1908	14,000
1909	39,000
1910 (up to March 25, when trade ceased)	11,000

This falling off was due to the fact that they could not use non-union goods. Its sales to the Iroquois Door Co. are as follows (1839):

1908	$11,000
1909	38,000
1910	39,000
1911	2,000

and the $2,000 sold to this customer in 1911, were shipped to points outside of New York City.

On October 15th, 1910, the concern received a letter from the Iroquois Door Co., stating that on account of the union situation in New York City, "it is necessary for us to cancel any and all unfilled door orders which we may have with you for shipment to any station in Greater New York or to New York City for lighterage delivery. We regret the necessity for taking this action, but the situation in this city is such that we cannot continue to use goods made in unfair shops" (1840-1). The concern also talked with the manager of the Iroquois Door Co., of Buffalo, who stated that he felt he would be unable to use the goods (1841).

Marks & Jacobson and the Empire Door & Trim Co., who were customers, refused to make purchases after the early part of 1910 on the ground that the goods were non-union (449-50), and the Empire City-Gerard Co., Iroquois Door Co. and Murray & Hill Co. have each discontinued busi-

ness (1852) because they are afraid to buy (489) (1860), so that all of the Manhattan business has now been lost (447-48).

Prior to January, 1910, none of these customers had objected to the material as non-union (449), but now they do not even submit lists for estimates as before (493). In the meanwhile the Brooklyn business has continued the same (1853), 1854), showing that these losses in Manhattan are not due to depression in trade, or the unpopularity of the goods. The principal Brooklyn customer is Macauley, to whom they sell $40,000 of goods annually, and Macauley testifies that while he cannot openly dispose of the doors in Manhattan (854-6) there is no difficulty in disposing of them openly in Brooklyn (854-55). On account of this difficulty in Manhattan his business in McMillen doors has fallen off (856-863-65).

Cross, Austin & Ireland, of Brooklyn (709-10; 445), large open-shop manufacturers, which the union have undertaken to unionize, are also important customers.

If the Court cannot give relief this concern will be driven out of Brooklyn and other trade centers and will be unable to regain any of the Manhattan business.

Lothman Cypress Co.—Curtis & Yale Co.

These two remaining complainants have had a small trade at times with customers in the City of New York, but rely primarily upon the proposition that they are prepared and equipped to supply this metropolitan market with the products of their mills, but that they are prevented and deterred from so doing on account of the unlawful

combination of the defendants, which interferes with the sale of their products because they operate an open shop instead of a closed or union shop (Par. 9, Complaint). The uncontradicted testimony given by the officers of these two concerns upon this point substantiates their contentions (Curtis, 1730; Waters, 1874), and legal principles entitle them to relief under such circumstances, even though they have no established trade.

American Banana Co. v. United Fruit Co., 166 Fed., 263.
Penn. Sugar Co. v. American Sugar Co., 166 Fed., 255.
Thomsen v. Union Castle S. S. Co., 166 Fed., 253.
U. S. v. Patterson, 59 Fed., 282.

The eight complainants are united in this suit as co-complainants and competitors whose interstate trade is directly and similarly affected by the same combination (Par. 27, Complaint) and they seek solely the right to transact interstate commerce as competitors in the same line of business "upon a basis of fair competition" without interference from the defendants (Pars. 6 and 20, Complaint).

The combination proved is seeking to drive all open shop articles out of commerce by making them unsalable and worthless in the various trade centers requiring such merchandise.

POINT I.

The combination falls within that class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of interstate trade except on conditions that the combination imposes, and therefore violates the Anti-Trust Law.

The object of the defendants is to control conditions of manufacture by preventing the sale and use of manufactured articles unless they come from mills operated and exclusively manned by members of the combination. Trade is to be monopolized by an artificial combination between those who produce the articles and those who use and install them; between the manufacturers and those whose services are essential to the usefulness of the articles at the point of delivery and consumption. It is a combination between the sources of production and those who control distribution and consumption, to limit the market to producers joining such combination. According to the defendants' contention, they must protect the union mills from the competition of non-union mills because, under the natural law of trade and competition, the union mills cannot survive with their increased cost of production. (Union's Answer, paragraphs 22 and 23, pp. 123-4.) "If the union men working on the buildings should not discriminate against the non-union material, the non-union mills through competition would practically drive every union mill out of existence" (Testimony of defendant Neal, 2429), so that they would become jobbers purchas-

ing the open shop materials of Western manufacturers (2430-31). The manufacturing defendant, O'Neil, speaking in behalf of all, states that the market must be closed to open shop trim in order to protect the union mills from open shop competition (755; 757-8) and that "they must make up their minds that when they say so, not a stick of that trim shall be erected in New York, and until they do, they cannot do business" (760). They are aiming to monopolize the business from Boston to Washington (1007). The rule against using or working on open shop trim was therefore adopted to destroy open shop competition. The Master Carpenters' Association also take active steps to enforce this regime in order to protect themselves from the competition of independent contractors using such material ( ).

Restraint of trade and competition are the objects and purposes which the defendants plead and prove.

The conceded purpose is to increase profits and wages in the union mill and to do this by the only possible method by which men working on buildings could accomplish such a purpose, viz.: restraining trade or commerce by making open shop products unsalable. There is no relation between the buildings and the factories except commerce, so that the only way in which the conditions in the mills can be affected by the conduct of the men at the buildings is by controlling commerce. How can the means adopted, viz.: refusal to work on open shop materials on the buildings, accomplish the purpose, viz.: of controlling conditions in the mills, except by restraining trade or commerce, and why do the members of this combination adopt this *means* to attain this *end* unless they

calculate and intend to restrain trade and commerce? The combination is adopted for and adapted to restraint of trade.

In making their defense, the journeymen defendants working on the buildings seek to place themselves in the position of producers of merchandise who desire to further the sale of the products of their fellow-members by restraining the sale of the products of non-members, although as a matter of fact they take no part in the production of merchandise for commerce and being workmen are not in any sense competitors of the plaintiffs.

Barnes v. Chicago Typographical Union, 83 N. E., 940 (Ill.);
Martell v. White, 185 Mass., 255;
George Jonas Glass Co. v. Glass Blowers, 66 Atl., 953 (N. J.);
Evenson v. Spaulding, 150 Fed., 517;
Barr v. Essex Council, 33 N. J. Eq., 101;
Berry v. Donovan, 188 Mass., 353;
Moores v. Bricklayers, 23 Weekly Law Bul., 665.

The union manufacturers and their employees have an undoubted interest in extending the sale and use of any merchandise which is produced by their joint efforts, and may, therefore justify and excuse any injury which they inflict upon their competitors by the ordinary methods of legitimate competition. They cannot, however, by association or combination with journeymen who have no such interest, but exercise a despotic control over the use and installation of such products, destroy the competition of business rivals and

monopolize the market. This is no ordinary labor case, but an instance where the defendants are seeking to project their influence into trade and commerce for the purpose of preventing the sale and distribution of completed articles of common use produced by their competitors. It is an attempt to drive open shop products out of commerce. A strike of the complainant's employees to control the terms of their own hiring in the complainant's mills, would constitute the usual labor case, where only the question of the manufacturing was involved and not the question of commerce.

> "Commerce succeeds to manufacture and is not a part of it. * * * Manufacture is transformation, the fashioning of raw materials into a change of form for use. The functions of commerce are different. Buying and selling and the transportation incident thereto, constitute commerce."
>
> U. S. v. Knight, 156 U. S., 1.

Any attempt to control the conditions of employment in factories by blockading the channels of trade and commerce to all commodities that are produced by the non-conformist factory, is obviously a conspiracy in unreasonable restraint of trade.

Now witness what the union and the union manufacturers have actually accomplished in their avowed effort to protect themselves from the competition of open shop products. Through repeated strikes against open shop products and their triumphant league with thirty-five other trades, to prevent the employment of non-union carpenters, they have completely destroyed all trade and commerce in these open shop products in Manhattan and the Bronx and have compelled

manufacturers, dealers and nearly all the important carpenter contractors in the city, to sign agreements—some under large penalties—not to purchase open shop products. By reason of this combination practically all trade in open shop products ceased after October, 1909, in the restricted territory. The Island of Manhattan and part of the Bronx is as completely deprived of the benefits of trade and competition in open shop work as if it were surrounded by a fleet of hostile battleships, and this metropolitan market is monopolized through this restraint by the higher priced products of union mills. The complainants have each lost their established trade in the restricted territory and cannot now do business there *at any price,* while the same is true of their customers who operate large open shop manufactories in the adjoining Borough of Brooklyn. A formidable effort is now being made through a repetition of the successful means that were employed in Manhattan to accomplish the same result in the Borough of Brooklyn, and to quote the uncontradicted statement of a defendant: "In a short time the Eastern territory will be closed and we cannot sell our goods any place" (1007). Under the resolution of its own convention, the powerful Brotherhood has instructed its officers "that the work be continued along these lines until all mills and factories in the woodworking industry are under our jurisdiction (2200).

Our contention is that the facts not only show a clear violation of the statutes, but the most complete and stratling instance where a monopoly in trade is successfully maintained for higher priced articles in the very locality where the potentialities of competition are the strongest. The tide of

competition in open shop articles has not been stayed by the consent or combination of the open shops; the open shops are still producing articles in large quantities and at lower prices in this very vicinity, and the builders of this metropolis are ready to purchase them, but all trade and competition at any price is impossible, because of the fear inspired by this combination. It is a monopoly maintained by the enforced exclusion of outsiders, even before the outsider has been completely destroyed. In the presence of manufacturers who are ready, able and desirous of selling their merchandise at low prices, the metropolitan market is given over exclusively to a united group of producers who admit that under the natural laws of trade and competition they could not continue manufacturing but must become jobbers of open shop materials. These uneconomic manufacturers and their employees deprive the people of New York of all opportunity to have their buildings erected with open shop materials because they, as union shops, cannot meet the open shop prices due to country conditions where rent and taxes are lower and labor is happier with lower wages.

We have therefore the avowed intent to restrain commerce; the adoption of methods well calculated to attain this end; and the attainment of this end by the suppression of all competition. All of the elements known to monopolies and restraint of trade conspiracies are present, and the combination violates the Federal Anti-Trust Law.

The distinction between a combination where parties voluntarily subject themselves to a self-imposed restraint, and a combination which has also the objective purpose of interfering with out-

siders, has been recognized by this Court, which holds that the latter combination implies a wrongful purpose. All questions as to whether the restraint is reasonable or unreasonable, direct or indirect, incidental or primary, arise only in that class of cases where the restraint grows out of some natural business operation, and have no application to cases where the combination has no object or purpose except to restrain trade and where the benefits which it seeks to obtain are only the result of restraint in excluding outsiders (Thomsen v. Union Castle Mail S.S. Co., 166 Fed., 251). To this class of cases the combination in question unquestionably belongs and the statute unquestionably applies.

> "Section 1 of the act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints; as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce or restrict the common liberty to engage therein (Loewe v. Lawlor, 208 U. S., 274, 293, 301, 52 L. ed., 488, 496, 502, 28 Sup. Ct. Rep. 301. As was said of this section in Standard Oil Co. v. United States, 221 U. S., 1, 59, 55 L. ed., 619, 644, 34 L. R. A. (N. S.) 834, 31 Sup. Ct. Rep. 502, Ann Cas., 1912 D, 734):
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> "The context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice

have come to be considered as in restraint of trade in a broad sense.' "

United States v. Patten, 226 U. S., 525; 57 L. Ed., 333.

In the case of Loewe v. Lawlor, 208 U. S., 274; 52 L. ed., 274, it appeared that the combination of the defendant labor union was to drive the plaintiff's open shop products out of commerce. The means used were a strike in the factory, followed by a boycott against all persons who dealt in the boycotted hats. The Court said:

"The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes and there is no doubt that, to quote from the well-known work of Chief Justice Earle on Trade Unions 'at common law every person has individually and the public also has collectively a right to require that the course of trade should be kept free from unreasonable obstruction.' "

In the opinion of Justice Holmes in the case of Northern Securities Co. v. U. S., 193 U. S., 197; 48 L. ed., 679, the distinction between a combination where the parties by agreement subject themselves to a restraint, and a combination which has for its main purpose to compel strangers to submit to the restraint, is discussed most clearly.

"Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their in-

tended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized or attempted to monopolize some portion of the trade or commerce of the realm."

In the Standard Oil case this Court again touched upon this question:

"* * * It is also true that while the principles concerning contracts in restraint of trade—that is, voluntary restraint, put by a person on his right to pursue his calling, hence only operating subjectively—came generally to be recognized in accordance with the English rule; it came, moreover, to pass, that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices—in other words, to monopolize—came also in a generic sense to be spoken of and treated as they had been in England as restricting the due course of trade and therefore as being in restraint of trade. * * * The dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitations on competitive conditions caused by contracts or other acts of individuals or corporations, led as a matter of public policy to the prohibition, or treating as illegal, all contracts or acts which were unreasonably restrictive of competitive conditions either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary, were of such a character as to give rise to the inference or presumption that they had been

entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancements of prices, which were considered to be against public policy."

Standard Oil Co. v. U. S., 221 U. S., 1.

"We have, then, two distinct kinds of contracts which the common law recognized as in restraint of trade: (1) Contracts *per se* in restraint of trade, whereby an individual contracts himself out of a trade; and (2) contracts which tend to destroy competition and thus create monopolies (Northern Securities Case, 193 U. S., 403, 24 Sup. Ct., 436, 48 L. ed. 679). The validity of the first class is determined by the reasonableness of the particular contract, while the second class are against public policy and invalid because of their tendencies, without refernce to their reasonableness. The former are generally, if not always, ancillary to a valid principal contract, and, although technically in restraint of trade, are not within the purview of the anti-trust statute (Cinn. Packing Co. v. Bay, 200 U. S., 179, 26 Sup. Ct., 208, 50 L. Ed., 428; Booth & Co. v. Davis (C. C.), 127 Fed., 875; Espenson v. Roepke, 93 Minn., 279, 101 N. W., 168. See Shawnee Compress Co. v. Anderson, 209 U. S., 423, 28 Sup. Ct. 572, 52 L. Ed., 865").

State v. Duluth Board of Trade, 121 N. W., 395 (Minn.);
Brown & Allen v. Jacobs Pharmacy, 41 S. E., 553 (Ga.).

A. *If the object of the combination be the illegal one described it is immaterial that the means are otherwise innocent and lawful.*

The right to work or quit work, the right to buy or sell or own property, the right of assembly and the right of free speech, are all constitutionally protected rights, equally sacred before the law and each of which becomes illegal when exercised in furtherance of an illegal plot. There is nothing talismanic about the right to strike which excepts it from this universal and wholesome rule of law.

> "No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot and if it is a step in a plot, neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law."
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> Aikens v. Wisconsin, 195 U. S., 204.

In the case of Gompers v. The Buck Stove & Range Co., 221 U. S., 418, an attempt was made to hold Gompers and others for contempt for violation of an injunction against boycotting and the issuing of certain literature in furtherance thereof. The respondent contended that the injunction violated the constitutional right of free speech and that all of the acts upon which the alleged contempt was based were within his rights under the constitutional guaranty of free speech, which the Court had no power to enjoin. The decision of the Supreme Court was aimed primarily at this contention, and was in part as follows:

> "The Court's protective and restraining powers extend to very device whereby property is irreparably damaged or commerce is illegally restrained. To hold that the restraint of trade under the Sherman Anti-trust Act or on general principles of law could be enjoined, but that the means through which

the restraint was accomplished could not be enjoined, would be to render the law impotent."

Gompers v. Buck Stove & Range Co. (*supra*).

"The scheme as a whole seems to us to be within the reach of the law. The constituent elements, as we have already stated them, are enough to give to the scheme a body, and for all that, we can say to accomplish it. Moreover, whatever we may think of them separaately, when we take them up as distinct charges they are alleged sufficiently as elements of a scheme."

Swift & Co. v. U. S., 196 U. S., 375;
U. S. v. Reading, 226 U. S., 324.

In the case of Loewe v. Lawlor, 208 U. S., 288, which was a suit for damages under the Sherman Anti-Trust Law, the principal means employed to restrain trade were the lawful means of ordering a strike and withdrawing, and threatening to withdraw, patronage from plaintiffs' customers, but the Court sustained the complaint and quoted with approval the foregoing extracts from the cases of Aikens v. Wisconsin (*supra*) and Swift v. U. S. (*supra*).

This doctrine that an act otherwise legal may become illegal when exercised in furtherance of an illegal conspiracy has been frequently applied in the case of strikes.

A strike to injure an employer is illegal.

Arthur v. Oakes, 63 Fed., 310 (C. C. A. Harlan, *J.*).
Old Dominion S. S. Co. v. McKenna, 30 Fed., 48.
Mapstrick v. Ramge, 2 N. W., 297.

A sympathetic strike where the strikers do not seek direct benefit for themselves, is illegal.

Pickett v. Walsh, 192 Mass., 572;
Reynolds v. Davis, 198 Mass., 294;
Labatt on Master & Servant, §§2698-2700.

"By the weight of authority and in accord with sound public policy, a sympathetic strike or a boycott must be held unlawful as not within the immediate field of competition. Persons who have nothing to do with a trade dispute—non-combatants—cannot be compelled by such means to take part in the struggle. A boycott as that term is ordinarily used, and a sympathetic strike, are attacks upon society itself. They are only justified when revolution is justified."

Kemp v. Div. No. 241, Amal. Society, 99 N. E., 389 (Ill.) (Judge Carter's opinion).

A strike to interrupt interstate commerce is illegal.

In re Debs, 158 U. S., 593;
Wabash v. Hannahan, 121 Fed., 564;
Toledo A. A. & N. M. R. R. Co. v. Penn Co., 54 Fed., 730.

A combination of railway employees to tie up interstate commerce by a strike, offends the Sherman Anti-Trust Law.

U. S. v. Elliott, 62 Fed., 801;
U. S. v. Alger, 62 Fed., 824;
U. S. v. Cassidy, 67 Fed., 700;
U. S. v. Workingmen's Council, 54 Fed., 994 (Aff'd 57 Fed., 85);
U. S. v. Debs, 64 Fed., 724;
Thomas v. Cincinnati R. R. Co., 62 Fed., 821.

A strike to compel an employer to operate a closed shop is illegal.

Folsom v. Lewis, 208 Mass., 336 (other cases *infra*).

A strike to prevent the employment of a certain workman is illegal.

Erdman v. Mitchell, 207 Pa. St., 79.

A strike to bring about the employment of union men exclusively throughout any considerable part of an industry in any community, is illegal.

Schwartz v. International Ladies' Garment Workers, 124 Supp., 968;
Schlang v. Ladies' Waist Workers, 124 Supp., 289;
McCord v. Thompson-Starrett Co., 113 Supp., 385 (Aff'd 198 N. Y., 587);
Connors v. Connolly, 86 Atl. Rep., 600; 86 Conn., 641.

A strike to prevent a railroad from hauling Pullman cars is illegal.

Thomas v. Cincinnati R. R. Co., 62 Fed., 818.

A strike to prevent a railroad handling cars of a connecting railroad is illegal.

Toledo A. A. & N. M. Co. v. Penn. Co., 54 Fed., 730.

A strike against a manufacturer because he

does work for a fellow-manufacturer who is tied up with a strike, is illegal.

Schlang v .Ladies' Waist Workers, 124 Supp., 289.

A strike to extort money is illegal.

Carew v. Ruthersford, 106 Mass., 1;
March v. Bricklayers' Union, 63 Atl., 91;
People v. Barondess (for opinion, see 16 N. Y., Supp., 436); Aff'd 133 N. Y., 649;
People v. Hughes, 137 N. Y., 29.

Where the strike is illegal, the payment of strike benefits may be enjoined.

Reynolds v. Davis, 198 Mass., 294;
Folsom v. Lewis (*supra*);
Smithers v. National Union, 25 Times L. R., 205; 1 K. B., 310 (1909).

In case of an injunction issued against a strike to prevent the hauling of cars, an employee who strikes in violation of the injunction may be punished for contempt.

In re Lennon, 166 U. S., 548.

Strikes to compel an employer to give up his business relations with another employer, or to cease patronizing another employer, are illegal.

(See cases Point X.)

It has been repeatedly held that no device may be used to defeat the purpose of the statute. In

the case of United States v. The American Tobacco Co., 221 U. S., 181, this Court in referring to the Standard Oil Company case, said:

> "It was pointed out that the generic designation of the first and second sections of the law when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibition of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating the policy by resorting to any disguise of subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibition of the statue."

B. *If the means employed are calculated and intended to restrain interstate trade, it is immaterial that they are to be performed or operate entirely within the limits of one State.*

> "If the purpose of the combination were, as alleged, to prevent interstate transportation at all the fact that the means operated at one end before physical transportation commenced, and at the other end after the physical transportation ended was immaterial."

Loewe v. Lawlor, 208 U. S., 274.

> "The mere fact that the sales and deliveries took place in Pennsylvania is not controlling when as here the expectation was that the coal would for the most part fall into and become a part of the well-known current of commerce between the States and the general consuming markets of other States. * * * The purchase and delivery within the State was but one step in a plan and

purpose to control and dominate trade and commerce in other States for an illegal purpose."

U. S. v. Reading, 226 U. S., 324.
Swift & Co. v. U. S., 196 U. S., 375.

In cases like the Northern Securities case against U. S., 193 U. S., 197, and U. S. v. Terminal R. R. Ass'n, 227 U. S., 683, the act by which the restraint is brought about is committed entirely within one State

C. The case at bar is undistinguishable in principle from the cases of Montague v. Lowry, 193 U. S., 38; Loewe v. Lawlor, 208 U. S., 274; Eastern States Retail Lumber Dealers' Association v. U. S., 234 U. S., 600, and Lawlor v. Loewe, 235 U. S., 522.

In the case of Montague v. Lowry, 193 U. S., 38, the plaintiffs were dealers in tiles in San Francisco, and the defendants belonged to an association of wholesale dealers in California and manufacturers outside of California who supplied them with merchandise. Only dealers carrying at least $3,000 of stock were eligible. All members of the association were forbidden to purchase from any non-member, manufacturers were forbidden to sell non-members, and dealers were forbidden to sell non-members except at the list price, which was 50% higher than the prices to members. After the association was formed, the plaintiffs could not purchase materials except at advanced prices, and brought suit for damages under the anti-trust statute. In reviewing this case the Court said:

"The result of the agreement when carried out was to prevent the dealer in tiles in

> San Francisco, who was not a member of the association, from purchasing or procuring the same upon any terms from any of the manufacturers who were such members, and all of those manufacturers who had been accustomed to sell to the plaintiffs were members. The non-member dealer was also prevented by the agreement from buying tiles of a dealer in San Francisco who was a member, excepting at a greatly enhanced price over what he would have paid to the manufacturer or to any San Francisco dealer who was a member if he, the purchaser, were also a member of the association. The agreement therefore restrained trade, for it *narrowed the market* for the sale of tile in California from the manufacturers and dealers therein in other States, so that they could only be sold to the members of the association, and it enhanced prices to the non-member, as already stated. * * * It was not a combination or monopoly among manufacturers simply, but one between them and dealers in the manufactured article, which was an article of commerce between the States. * * * It is also contended that as the expressed object of the association was to unite therein all the dealers in San Francisco and vicinity, the plaintiffs had nothing more to do than join the association, pay their fees and dues and become like one of the other members. * * * The plaintiffs, however, could not by virtue of any agreement contained in such association be legally under obligation to become members in order to enable them to transact their business as they had theretofore done and to purchase tile as they had been accustomed to do before the association was formed."

The combination in the case at bar, which excludes non-union trim from the market by agreements between manufacturers of trim and journeymen carpenters who install it on the build-

ings, as well as restrictive agreements extorted from distributors of trim, is certainly as much forbidden by the statute as the combination in Montague v. Lowry. Both are combinations between the sources of production and distribution to limit the market to members thereof.

The case of Loewe v. Lawlor, 208 U. S., 274, concludes the defendants on all the points which they raise as to the application of the statute. In that case the defendants sought to unionize the plaintiffs' factory by first instituting a strike to prevent production, and then by driving his non-union products out of interstate commerce through a boycott which rendered those products unsalable in the different States. The ultimate object of the defendants was to unionize the plaintiffs' factory and promote the sale of union label hats made by union members, but the law would not permit them to accomplish this legitimate end by restraining the plaintiffs' trade.

In the case of the Eastern States Retail Lumber Dealers' Association v. United States, 234 U. S., 600, an association of retail lumber dealers desiring to protect their business from the inroads of wholesalers who sold directly to consumers, adopted a scheme of issuing lists of wholesalers pursuing such objectionable practices. The retailer was free to observe such lists by withdrawing patronage or to entirely disregard them by continuing to patronize such wholesalers. Unlike the case of secondary boycotts, he was under no agreement or constraint to discontinue patronage with the offending wholesaler. Concerning this combination, this Court said:

> "But it is said that in order to show a combination or conspiracy within the Sherman Act, some agreement must be shown under

which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done; and when, in this case, by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred. The circulation of these reports not only tends to directly restrain the freedom of commerce by preventing the listed dealers from entering into competition with retailers, as was held by the district court, but it directly tends to prevent other retailers who have no personal grievance against him, and with whom he might trade, from so doing, they being deterred solely because of the influence of the report circulated among the members of the associations. In other words, the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations, who had reported a wrong to himself, which grievance, when brought to the attention of others, it was hoped would deter them from dealing with the offending party. This practice takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within the act, and puts it within the prohibited class of undue and unreasonable restraints, such as was the particular subject of condemnation in Loewe v. Lawlor, 208 U. S., 274, 300; 52 L. ed., 488, 501; 28 Sup. Ct. Rep., 301; 13 Ann. Cas., 815."

In the case of Lawlor v. Loewe, 235 U. S., 522, this Court in reviewing the lumber dealers' case, said:

> "Whatever may be the law otherwise, that case establishes that irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of unfair dealers manifestly intended to put the ban upon those whose names appear therein among an important body of possible customers, combined with a view to joint action and, in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain, and restrains, commerce among the States."

The practices in the case of the Lumber Dealers' Association, which were further condemned in the recent decision of Loewe v. Lawlor, seem mild indeed when compared with the case at bar. In addition to the issuance of so-called "unfair" and "fair" lists, designed for joint action in restraining trade, the combination in this case exacts formal agreements from purchasers of wood trim to the effect that they will observe such lists and purchase only union trim, and visits severe penalties on recalcitrants who patronize the proscribed concerns. To depart from the rules of the combination means labor difficulties, losses and forfeiture of bonds to contractors, owners, dealers and others who supply or distribute wood materials for consumption and use in the general market.

The application of the Anti-Trust Law to this combination seems too clear for argument and the Judges in the lower Court entertained no doubt on this point.

> Irving v. Neal, 209 Fed., 471.
> Paine v. Neal, 212 Fed., 259 (case at bar).

POINT II.

The complainants being irreparably injured in their property rights by acts in violation of the Anti-Trust Law, are entitled to an injunction.

The jurisdiction of the District Court was invoked both on account of diversity of citizenship and the Anti-Trust Law. The complainants appealed to its general equitable powers to protect them from irreparable injury to their property rights by unlawful and criminal acts. To deny the power and duty of the Chancellor to protect property rights from irreparable injury due to criminal acts, involves an overthrow of fundamental principles and unfortunate consequences which would be far-reaching. If the Federal Anti-Trust Law supersedes all other law relative to combinations which restrain interstate trade and is to be construed as denying the right of an injunction to a private party, then persons irreparably injured in their property rights by such criminal acts which were exclusively in restraint of interstate trade, would be deprived of their property without due process of law. Under such construction they could not sue for an injunction under any other law and would thereby be denied the right of injunction which alone could protect their property rights from irreparable injury of this character. The Federal statute is only declaratory of the common law without adding to or subtracting from the substantive offense; it specifies the remedies of treble damages, confiscation, and injunction by the government, which were not available under the common law, and by making restraints which were purely subjective in their

nature affirmatively unlawful, entitles a private party suffering damage therefrom to all available civil remedies. Since the law does not lay down any new rule as to combinations which are legal or illegal, the remedies which it prescribes are cumulative and do not exclude common law remedies.

36 Cyc., 1175-76.
Rosin v. Lidgerwood, 89 App. Div., 245.

The law should be construed with a view to suppressing the mischief and advancing the remedy for which it is obviously designed, and to carry with it all the incidents and available remedies which usually accompany such statutes. The specification of the three particular remedies expressly given by the law was for the purpose of providing effective remedies which the common law did not afford, but such specification should not be construed as excluding the usual common law remedies which would accompany the enforcement of such statute in the absence of such specification, particularly in view of the fact that the statute is only declaratory of the common law. To deny a party an injunction, under such law, because it specifies more drastic remedies than the common law would allow, would be to largely defeat the remedial character of the statute and to deprive private citizens of the very protection which the statute was designed to give them for the public good. Upon this question, however, the lower courts are in disagreement.

The cases holding that parties injured by acts in violation of this law are entitled to an injunction under general equitable principles, are as follows:

Bigelow v. Calumet & Hecla Mining Co., 155 Fed., 877; aff'd 167 Fed., 721.

U. S. v. Addyston Pipe & Steel Co., 85 Fed., 279.

Mannington v. Hocking Valley Ry. Co., 183 Fed., 140.

De Koven v. Lake Shore & Mich. So. Ry. Co., 216 Fed., 955.

Hitchman Coal & Coke Co. v. Mitchell, 202 Fed., 512.

Walsh v. Ass'n of Plumbers, 71 S. W., 455 (Mo.).

Portions of the opinions in the cases of Gulf C. & S. F. Ry. Co. v. Miami S. S. Co., 86 Fed., 407, and Blindell v. Hagan, 54 Fed., 40; 56 Fed., 696, sustain the same view when the Federal Court has jurisdiction of the parties on the ground of diverse citizenship.

The cases expressing contrary views, although some of them are distinguishable, are as follows:

National Fireproofing Co. v. Mason Builders, 169 Fed., 259.

Pidcock v. Harrington, 64 Fed., 821.

Greer Mills & Co. v. Stoller, 77 Fed., 1.

So. Indiana Express Co. v. U. E. Express Co., 88 Fed., 659; 92 Fed., 1022.

Metcalf v. Amer. School Furniture Co., 122 Fed., 115.

Mitchell v. Hitchman Coal & Coke Co., 214 Fed., 685.

Fleitman v. United Gas Improvement Co., 211 Fed., 103.

Corey v. Independent Ice Co., 207 Fed., 459.

In the case of United States v. Addyston Pipe & Steel Co. (*supra*), Judges Harlan, Lurton and Taft, sitting as a Circuit Court of Appeals, said:

> "The effect of the Act of 1890 is to render such contracts unlawful in an affirmative or positive sense and punishable as a misdemeanor and to create a right of civil action for damages in favor of those injured thereby and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such trade restraints."

The most exhaustive review of the subject is made by Judge Knappen in Bigelow v. Calumet & Hecla Mining Co., 155 Fed., 877, and his conclusion was affirmed by Judge Lurton in 167 Fed., 721. In upholding the right to an injunction Judge Knappen distinguished many of the cases which held a contrary doctrine and said:

> "While the decisions referred to are entitled to great respect, they do not commend themselves to my judgment so far as they deny the right of a private party, who has sustained special injury by the violation of the Anti-Trust Act, to relief by injunction under the general equity jurisdiction of the Court. As already seen, the cases referred to do not generally announce such a rule. The case of Minnesota v. Northern Securities Co., 194 U. S., 48, 70, 72, does not, to my mind, assert the rule contended for by defendants. On the contrary, it seems to recognize by implication a contrary rule * * * I cannot overlook the fact that the Federal Anti-Trust Act is highly remedial. Its apparent object is not to restrict but to extend remedies. The seventh section gives the Circuit Court jurisdiction without respect to the amount in controversy allows threefold damages and the costs of suit, including a reasonable attorney's fee. The very penal provisions in-

> voked by defendant's counsel as requiring a strict construction of the act are but evidence of the highly remedial nature of the statute, and I am loath to conclude that a statute of this nature should be construed as taking away the otherwise existing jurisdiction of equity to afford relief. In this case jurisdiction is conferred by the diverse citizenship of the parties * * * In my opinion, under the case here presented, the objection that remedy by injunction cannot be afforded at the instance of the injured party should not be sustained."

It also seems to us that the case of Minnesota v. Northern Securities Co., 194 U. S., 48, holds that where special injury is shown, an injunction should issue.

It is our contention that under general principles any person specially injured in his property rights by criminal or unlawful acts, is entitled to the usual and appropriate civil remedies to protect him therefrom, and that there is nothing in the Sherman Act which deprives him of that right or contracts the power of the District Court to grant him injunction relief.

In the case of Hayes v. Michigan Central R. R. Co. (111 U. S., 228; 28 L. Ed., 411), the court held that a suit for damages would lie for injury due to failure of the railroad to erect a fence as required by an ordinance, and said:

> "It is said, however, that it does not follow that whenever a statutory duty is created, any person who can show that he has sustained injuries from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed, and we are referred to the case of Atkinson v. Newcastle Water Works Co., L. R., 2 Exch. Div., 441, as authority for

that proposition, qualifying as it does the broad doctrine stated by Lord Campbell in Couch v. Steel, 3 El. & Bl., 402. But accepting the more limited doctrine admitted in the language of Lord Cairns in the case cited, that whether such an action can be maintained must depend on the 'purview of the legislature in the particular statute and the language which they have there employed,' we think the right to sue under the circumstances of the present case clearly within its limits * * * The duty is due not to the city as a municipal body but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation and to an action for its recovery. 'The nature of the duty,' said Judge Cooley in Taylor v. L. S. & M. S. R. Co., 45 Mich, 74, 'and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their special benefit.'"

It seems obvious that the Anti-Trust Law, which expressly provides for a remedy to the individual and which seeks to benefit the public and individuals alike by protecting individuals in the right of free competition, answers the test set forth in this last case.

The fundamental doctrine underlying the principle which affords a remedy to a party injured by criminal acts, is also set forth in the case of Willy v. Mulledy, 78 N. Y., 314, which involved a failure to comply with statutory requirements relative to fire escapes. In that case the Court said:

"It is a general rule that whenever one

owes another a duty, whether such duty be imposed by voluntary contract or by statute, a breach of such duty causing damage gives a cause of action. Duty and right are correlative; and where a duty is imposed there must be a right to have it performed. When a statute imposes a duty upon a public officer, it is well settled that any person having a special interest in the performance thereof may sue for a breach thereof, causing him damage, and the same is true of a duty imposed by statute upon any citizen."

See, also:

Mairs v. B. & O. R. R. Co., 175 N. Y., 413.

Huda v. Amer. Glucose Co., 154 N. Y., 481.

"Whenever a man does an act which in law and fact is a wrongful act and such an act as may, as a natural and probable consequence of it, produce injury to another and which in the particular case does produce such an injury, an action on the case will be"

Angle v. Chicago & St. Paul Co., 151 U. S., 2.

In appropriate cases a court of equity will grant injunctive relief from such wrongful acts.

Bitterman v. L. & N. R. R. Co., 207 U. S., 206.

"Where one sustains an injury from the crime of another, a private action can be maintained to recover damages, unless the crime is capital."

1 Rev. Swift's Dig., side page 553.
In re Debs, 158 U. S., 593, 594.

"The commission of an act specifically forbidden by law or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury. Where the harm that ensues from the unlawful act or omission is the very kind of harm which it was the aim of the law to prevent (and this is the commonest case), the justice and necessity of this rule are manifest without further comment."

Pollock on Torts, Am. Ed., Webb, 1894, p. 24.
Cooley on Torts, 3rd Ed., p. 145.
Cook on Combinations, 2nd Ed., Sec. 15.
Addison Law of Torts, Ed. 8, p. 20.
Bishop on Non-Contract Law, Ed. 1889, Sec. 132.
Cooper v. Whittingham, 15 Ch. Div., 501.
Parker v. Barnard, 135 Mass., 120.

"As private and public wrongs and redress are separate and concurrent, provisions for the procedure as to the one have no relation to the same as to the other; so that, for example, if a statute creates a new offense and imposes a penalty, the remedy by injunction is nevertheless in a proper case available. So also in a proper case, not as of course in every one, an action at common law may be maintained by the private party in such circumstances."

Bishop on Written Laws, par. 250 B.
Hayes v. Porter, 22 Maine, 371.

In the case of Toledo A. A. & N. M. Ry Co. v. Penn Co., 54 Fed., 730, Judge Taft granted an in-

junction against certain conspirators on the ground that the acts enjoined were in violation of Sec. 5440 of the U. S. Revised States and Sec. 10 of the Interstate Commerce Act, which created a criminal offense. The case has so often been cited with approval, that we invite the attention of this Court particularly to it. The Court said:

> "All persons combining to carry out Rule 12 of the Brotherhood against the complainant company, if any one of them does an act in furtherance of the combination, are punishable under the foregoing Section. This is true, because, as already shown, the object of the conspiracy is to induce, procure, and compel the managing officers of the defendant companies to refuse equal facilities to the complainant for the interchange of interstate freight, which, as we have seen, is an offense against the United States by virtue of Section 10, above quoted. * * * Again, for the men, in furtherance of Rule 12, either to refuse to handle the freight or threaten to quit, or actually to quit, in order to procure or induce the officers of the defendant companies to violate the provisions of the Interstate Commerce Law would constitute acts in furtherance of the conspiracy and would render them also liable to the penalty of the same action.
>
> "But it is said that it cannot be unlawful for an employee either to threaten to quit or actually to quit the service when not in violation of his contract, because a man has the inalienable right to bestow his labor where he will and to withhold his labor as he will. Generally speaking, this is true, but not absolutely. If he uses the benefit which his labor is or will be to another, by threatening to withhold it, or agreeing to bestow it, or by actually withholding it or bestowing it, for the purpose of inducing, procuring or compelling that other to commit an unlawful

or criminal act, the withholding or bestowing of his labor for such a purpose is itself an unlawful and criminal act. The same thing is true with regard to the exercise of the right of property. A man has the right to give or sell his property where he will, but if he give or sell it or refuse to give or sell it, as a means of inducing or compelling another to commit an unlawful act, his giving or selling it, or refusal to do so, is itself unlawful. * * * But in the case at bar, although malice is certainly present, the illegality of the combination does not consist alone in that, for both the means taken by the combination and its objects are direct violations of both the civil and the criminal law as embodied in a positive statute. Surely it cannot be doubted that such a combination is within the definition of an unlawful conspiracy, recognized and adopted by the Supreme Court of the United States in Pettibone v. U. S. (148 U. S., 197), to-wit: 'A combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose ,not in itself criminal or unlawful, by criminal or unlawful means.' * * * Second, we now come to the character of Rule 12 and its enforcement as a civil wrong to complainant. Lord Justice Fry said, in the case of the Steamship Co. v. McGregor (L. R., 23, Q. B. Div., 598, 624): 'I cannot doubt that whenever persons enter into an indictable conspiracy, and that agreement is carried into execution by the conspirators by means of an unlawful act or acts which produce private injury to some person, that person has a cause of action against the conspirators' (See also Buffalo Lubricating Oil Company v. Standard Oil Company, 106 N. Y., 669: Old Dominion S. S. Co. v. McKenna, 30 Fed. Rep., 48; Carew v. Rutherford, 106 Mass., 1, and Moores v. Bricklayers' Union No. 1, 23 Week. L. Bull., 48).

"Under the principle above stated, Arthur

> and all the members of the Brotherhood engaged in causing the loss to the complainant are liable for any actual loss inflicted in pursuance of their conspiracy. * * * If a person, with rights secured by a contract, may, in the case of loss, recover damages from one not a party to the contract, who, with intent to injure him, induces a breach of it, *a fortiori*, can one whose rights are secured by statute recover damages from a person, who, with intent to injure him, procures the violation of those rights by another and causes loss?"

In the case of Hardie-Tynes Mfg. Co. v. Cruse, 66 So., 657 (Ala.), a manufacturer sought an injunction against picketing on the ground that such practices were declared criminal by the statute. The Court said:

> "It is hardly necessary to say that every criminal act which injures the person or property of another is also a civil tort redressible by the Courts and preventable in proper cases by injunctive process."

This case does not differ in principle in this respect from Thomas v. N. O. & T. P. Ry. Co., 62 Fed., 821, in which an injunction was granted against the combination violating the first section of the Sherman Anti-Trust Law. After holding that the combination was a boycott at common law, Judge Taft said:

> "More than this, the combination is in the teeth of the act of July 2, 1890, which provides that: 'Section 1—Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or

conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or both, said punishments in the discretion of the Court.'

"That such a combination as the one under discussion is within the statute just quoted, has been decided by Judge Billings, of Louisiana, in U. S. v. Workingmen's Amalgamated Council of New Orleans, 54 Fed., 994. His view has been followed by the Circuit Judges of this circuit within the past ten days, by Judges Woods, Allen and Grosscup, of the Seventh Circuit, and by Judge Woolson, of the Eighth Circuit. A different view has been taken by Judge Putnam in U. S. v. Patterson, 55 Fed., 605, but after consideration, Judge Lurton and I cannot concur with the reasoning of that learned Judge. The fact that it was the purpose of Debs, Phelan and their associates to paralyze the interstate commerce of this country is shown conclusively in this case and is known of all men. Therefore their combination was for an unlawful purpose and is a conspiracy within the statute cited."

The fact that Congress has since given a private individual the right to an injunction seems to indicate what was its intention under the original act. This question is discussed under Point XIII of our brief.

We submit that an injunction should issue to protect complainants' property rights from criminal acts, done in violation of the Sherman Act, which cause them special injury and that there is nothing in that act which expressly or impliedly deprives them of such remedy. The right to an injunction under such circumstances is not excluded unless expressly so provided by the statute. (Stevens v. Chown [1901], 1, Ch. 894.)

POINT III.

The complainants have suffered special damages entitling them to injunctive relief.

The District Court held that although the combination violated the common law, the State anti-trust law, State penal law and the Federal law, the complainants did not show a special injury entitling them to injunctive relief (2894-95).

On pages 41 to 63 of this brief, we point out how six of the complainants having an established business in New York City had suffered substantial damages in varying amounts, as the direct and intended result of the combination which they seek to enjoin. They prove the loss of this established trade in substantial, varying and definite amounts with specific customers as the direct and intended result of the combination. Such proof exhausts all the conceivable possibilities of proving damages in any boycott or restraint of trade case.

The injury is the very evil the statutes seek to remedy and the very result the defendant's seek to attain. The combination was directed against all non-union manufacturers seeking to dispose of wood materials in the restricted territory for the purpose of suppressing the sale of these competitive products, and the complainants were members of this limited group against which the combination was directed. All combinations of this character attack all non-members—all outsiders—and it is immaterial whether there is only one non-member, as in the case of Montague v.

Lowry, 193 U. S., 38, or a limited group of outsiders, as in the case at bar. The combination was intended to and did injure the complainants as non-comformists. They were personally visited and told that their goods could not be sold in New York and that they would soon be excluded from Boston to Washington. They were known by name and intentionally excluded from the market. It is misleading to say that the combination was not directed against them, for it had no other object than to direct itself against all non-union manufacturers, including the complainants, and if the complainants were unknown to the defendants the argument would be the same. Is it not possible to commit a tort against a class without knowing all of the members of that class by name. The manufacturer who sells a defective bicycle or poisoned ice cream is liable to the person ultimately injured, even though he never had heard of him. That principle applies to the law of negligence in numerous ways. The man who recklessly engages in wrongdoing regardless of whom it will injure is as much a wrongdoer as he who selects his victim. The manufacturer who improperly uses a city name for a trade-mark may be enjoined by all the manufacturers of that city who are interested in that name (24 Harvard Law Review, 143, cases cited). Can it then be said that a man who intentionally does an affirmative unlawful act against an entire class of competitors is not liable because he did not know at the outset the names or existence of one of the parties who were injured in the way he intended to injure.

There is no evidence to show that any other considerable number of manufacturers belonging

to the open shop group were at the time this suit was commenced, or at any time since had been, damaged by this combination or were desirous or capable of supplying the New York market with their products, and according to the cases, if there were any such proof, it would not alter the fact that the complainants have suffered special damage. Unlike the case of public nuisances to which we will refer, all of this damage was the very object of the illegal acts, and under such circumstances, the injured party will not be denied relief because the wrongdoers also injure and damage the business of a group of employers similarly situated. Any other rule would deny a person property without due process of law.

The complainants are in a stronger position than the employing garment workers of New York when 138 of them were attacked by an illegal strike in New York City and secured an injunction as an association (Schwarcz v. Garment Workers, 124 Supp., 968), or the retailers who sought an injunction on behalf of themselves and all other retailers similarly affected (Hawarden v. Youghiogheny, etc., Co., 87 N. W., 472). The numerous manufacturers of Cleveland became involved in a strike and a boycott was conducted against all Cleveland manufacturers without singling out any one for attack. The same thing happened in Erie, Penn. Can it be doubted in such a case that any one or all of these manufacturers would be entitled to an injunction? In these days of labor organizations and associations of employers, it will happen more and more often that industrial combinations will affect large groups of employers in the same way but an examination of the cases given under a different

point in this brief, and showing that complainants similarly affected by the same wrong may unite in one suit, are sufficient to show that the courts will aid private litigants although many others are similarly affected.

While not admitting the analogy of a public nuisance, where damage is not intentional, we will, nevertheless show that complainants' proof of damages in the case at bar is sufficient to conform to the rule laid down in public nuisance cases.

The object of issuing the injunction is to prevent irreparable damage or a multiplicity of suits, so that if the complainant can show damage of such a character as to entitle him to recover at law on account of a public nuisance, then a court of equity will intervene to enjoin that public nuisance on his behalf, provided that the nuisance is continuous or the damage irreparable. This doctrine was announced in the case of the State of Pennsylvania against the Wheeling, &c., Bridge Co., 18 How., 566; 14 L. ed., 269. The plaintiff sought to enjoin the erection of a bridge which would obstruct navigation and diminish the revenue of the State in connection with public works on the Ohio River, and the Court in granting the injunction, said:

> "But a proceeding on the ground of a private and an irreparable injury may be sustained against it by an individual or a corporation. Such a proceeding is common to the federal courts and also to the courts of the State. The injury makes the obstruction a private nuisance to the injured party; and the doctrine of nuisance applies to the case where the jurisdiction is made out the same as in a public prosecution. If the ob-

struction be unlawful and the injury irreparable, by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery. Such a proceeding is as common and as free from difficulty as an ordinary injunction bill against a proceeding at law or to stay waste or trespass. The powers of a court of chancery are as well adapted and as effectual for relief in the case of a private nuisance as in either of the cases named.

"* * * In Sampson v. Smith, 8 Simmons, 272, it was held that injury to the plaintiff's trade was sufficient to give jurisdiction against a public nuisance and that it was not necessary to use in such a prosecution the name of the attorney general, and this was on a bill for the discontinuance, of works already erected. * * *

"A court of equity will not only interfere upon the information of the attorney general, but also upon the application of private parties directly affected by the nuisance. * * *

"In the same volume, page 204 (2 Story's Eq.), it i ssaid: 'In regard to private nuisances, the intereference of courts of equity by way of injunction is undoubtedly founded upon the ground of restraining irreparable mischief or of suppressing oppressive and interminable litigation or of preventing multiplicity of suits (Mt. Eq. Pl. by Jeremy, 144, 145; Eden on Injunctions, Ch. II, 231, 238).

"There must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as from its continuance or permanent mischief, must occasion a constantly recurring grievance which, cannot otherwise be prevented than by an injunction. Formerly indeed, courts of equity were extremely reluctant to interfere at all, even in regard to repeated trespasses, but now there is not the slightest

> hesitation if the acts done or threatened to be done to the property would be ruinous or irreparable (2 Story's Eq., 207)."

In this case it will be seen that the test of jurisdiction is the necessity of action in order to avoid irreparable mischief and a multiplicity of suits, and the special damage which is constantly referred to is nothing more or less than such damages as would form the basis for a suit at law.

In the case of Georgetown v. Alexandria, 12 Pet., 91; 9 L. ed., 1012, the Court said:

> "The Court of Equity also pursuing the analogy of the law that a party may maintain a private action for special damages, even in cases of public nuisances, will now take jurisdiction in case of public nuisance at the instance of a private person where he is in imminent danger of suffering a special injury for which under the circumstances of the case the law would not afford an adequate remedy."

The case of Mississippi, &c., R. R. Co. v. Ward, 2 Black., 485; 17 L. ed., 311, is also in point. The plaintiff, part owner of several steamships, brought a suit against the railroad company to abate a nuisance which he alleged was created by the erection of a bridge on the river upon which his vessels plied. It was objected that he could not sue without joining with him as plaintiffs those who had part interest in his vessels.

The Court said:

> "A bill in equity to abate a public nuisance, filed by one who has sustained special damages, has succeeded to the former mode in England of an information in chancery, prosecuted on behalf of the Crown, to abate or enjoin the nuisance as a preventive remedy. The private party sues rather as a

public prosecutor than on his own account; and unless he shows that he has sustained, and is still sustaining, individual damage, he cannot be heard. He seeks redress of a continuing trespass and wrong against himself, and acts in behalf of all others, who are or may be injured; nor is there more necessity for joining with his partners in the prosecution than there is for his joining in the suit any other person, as complainant, who has sustained injury (Gibbons on Dilapidation, 402). The character of the nuisance and the sufficiency of the damage sustained is to be judged by the courts (Iveson v. Moore, Ld. Raym., 486; 1 Salk., 15; Gibbons on Dilapidation, 403). But the want of a sufficient amount of damage having been sustained to give the Federal Courts jurisdiction, will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern."

Nor does the fact that a considerable number of persons are affected by the same injury defeat a cause of action by one of the affected parties.

"The idea that if, by a wrongful act, a serious injury is inflicted upon a single individual, a recovery may be had therefor against the wrongdoer, and that if by the same act numbers are so injured, no recovery can be had by any one, is absurd. This, stripped of verbiage, is the ground of the motion. It is said that holding the defendant liable to respond in an action to each one injured will lead to a multiplicity of actions. This is true, but it is no defense to a wrongdoer when called upon to compensate for the damages sustained from his wrongful act, to show that he, by the same act, inflicted the like injury upon numerous other persons. The position is unsustained by any authority. While in the application to par-

ticular cases there is some conflict, yet there is none whatever in the rule itself. That rule is that one erecting or maintaining a common nuisance is not liable to an action at the suit of one who has sustained no damage therefrom, except such as is common to the entire community; yet, he is liable at the suit of one who has sustained damage peculiar to himself. No matter how numerous the persons may be who have sustained this peculiar damage, each is entitled to compensation for his injury."

Francis v. Schoellkopf, 53 N. Y., 152.

There are many cases giving the right to one or more abutting land owners to enjoin the obstruction of a highway or other public nuisance which similarly affects all neighboring or abutting landowners. In a suit by a private person to enjoin the keeping of a house of ill-fame the Court granted an injunction and said:

"That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner. The principle has been long settled that the objection that the nuisance was a common one is not available, if it be shown that special damage was suffered. • • • If it was a nuisance which affected the general neighborhood and was the subject of an indictment for its unlawful and immoral features, the plaintiffs were none the less entitled to their action for an injury sustained and to their equitable right to have its continuance restrained."

Cranford v. Tyrell, 128 N. Y., 344,
cited in *In re* Debs, 158 U. S., 593.

> "The obstruction of a public highway is an action which at law amounts to a public nuisance, and a person who sustains a private and peculiar injury from such act may maintain an action to abate the nuisance and to recover the special damages by him sustained. The extent of the injury is not generally considered very important. It should be substantial, of course, and not merely nominal, and the fact that numerous other persons have been injured by the act is no ground for the denial of the relief."
>
> Wakeman v. Wilbur, 147 N. Y., 657;
> Greer v. Smith, 140 Supp., 43 (N. Y. App. Div.).

It is submitted that the losses suffered by the complainants as the direct and intended result of this illegal and criminal combination are sufficient to give them standing as private litigants. The public prosecutor might tell them to secure their own relief.

POINT IV.

The defendants' combination violates Sections 340 and 341 of Article 22 of the General Business Law of New York, and complainants, being irreparably injured in their property rights by such unlawful acts, are entitled to an injunction.

Assuming that the Federal statute supersedes all State legislation relative to combinations in restraint of interstate trade, there is still room for the application of the State Anti-Trust Law also by reason of the peculiar facts of this case. This

combination has a double aspect. The evidence shows that it is in restraint of intrastate trade as well as interstate trade, and that the restraint upon the sale of complainants' products relates not only to the transaction between the complainants and their customers in New York State, which is interstate commerce, but to the sale and distribution of such products by their customers in New York State to and among customers in New York State, which is intrastate commerce. Such a combination within the State to prevent intrastate business in open shop products can and does destroy the complainants' interstate business and therefore presents a situation where the complainants' business is being destroyed by a combination in violation of the State Anti-Trust Law. We contend that these extra-state corporations importing merchandise into New York State may invoke the Federal laws on the ground that their interstate trade is restrained, and may invoke the State laws on the ground that the sale and distribution of their products within the State by dealers and purchasers, in which complainants have also a direct interest, is also restrained. These complainants sell goods to customers in New York State like Parshelsky Bros., The Hubbell Hardwood Door Co., Louis Bossert & Son, C. R. Macaulay, John S. Loomis Company, Moritz Arnstein, Thomas Edmonds, Cross, Austin & Ireland Lumber Co. and Albro J. Newton Co., each of whom, after purchasing said products, sells and distributes them for his own account through intrastate transactions among his customers in the same State. Through restraint of this intrastate trade, complainants' interstate trade may be restrained and destroyed and the complainants thereby injured by acts in violation of the State

law. It has already been decided by this Court that a person may be injured in his intrastate business by acts in violation of the Sherman Act and recover therefor under that Act (City of Atlanta v. Chattanooga Foundry & Pipe Works, 203 U. S., 390), and there seems to be no reason why the corollary of this proposition should not be true, to wit: that interstate business may be injured by a combination in violation of the State law and relief had therefor by reason of that law.

In the case of Standard Oil Co. v. State of Tennessee, 217 U. S., 413, 54 L. ed., 817, a judgment of ouster was obtained against the company under the State Anti-Trust law on the ground that the oil company had induced merchants in Tennessee to cancel orders from a rival company for oil to be shipped from Pennsylvania. The defendants contended that inasmuch as the transaction was interstate, only the Federal law could be applied, but this Court said:

> "It is said that as the only illegal purpose that can be attributed to this agreement is that of protecting the defendants' oil against interstate competition, it could not be made the subject of punishment by the State; that the offense, if any, is against interstate commerce alone.
>
> "The cases that have gone as far as any in favor of this proposition are those that hold invalid taxes upon sales by traveling salesmen, so far as they affect commerce among the States (Robbins v. Taxing Dist., 120 U. S., 489, 30 L. ed., 694; 1 Inters. Com. Rep., 45, 7 Sup. Ct Rep., 592; Rearick v. Pennsylvania, 203 U. S., 507, 51 L. ed., 295, 27 Sup. Ct. Rep., 159). These cases fall short of the conclusion to which they are supposed to point. Regulations of the kind that they deal with concern the commerce itself, the

conduct of the men engaged in it, and as so engaged. The present statute deals with the conduct of third persons, strangers to the business. It does not regulate the business at all. It is not even directed against interference with that business specifically, but against acts of a certain kind that the State disapproves in whatever connection. The mere fact that it may happen to remove an interference with commerce among the States as well as with the rest does not invalidate it. It hardly would be an answer to an indictment for forgery that the instrument forged was a foreign bill of lading, or for assault and battery, that the person assaulted was engaged in peddling goods from another State. How far Congress could deal with such cases we need not consider, but certainly there is nothing in the present state of the law, at least, that excludes the States from a familiar exercise of their power."

In the case of Addyston Pipe & Steel Co. v. United States, 175 U. S., 211, 44 L. ed., 136, the Court had before it a combination of manufacturers of pipe to restrain competition in the sale thereof, and it appeared that the combination had intrastate features as well as interstate features, inasmuch as some of the producing companies had allotted to them territory within the State where the pipe was produced and others of them sold outside the State. This Court held that the injunction which was broad enough to affect these intrastate transactions, was broader than could be allowed in a suit brought by the United States under the Federal Anti-Trust Law, because that law relates only to interstate commerce. Mr. Justice Peckham delivering the opinion of this Court, said:

"Although the jurisdiction of Congress over commerce among the States is full and

> complete, it is not questioned that it has none over that which is wholly within the State and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within the State by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the State. The combination herein described covers both commerce which is wholly within the State and also that which is interstate. * * * In brief their right to combine in regard to a proposal for pipe deliverable in their own State could not be reached by the federal power derived from the commerce clause in the Constitution. To the extent that the present decree includes in its scope the enjoining of defendants thus situated from combining in regard to contracts for selling pipe in their own State, it is modified and limited to that portion of the combination or agreement which is interstate in its character."

In the case of Strauss v. American Publishers' Association, 231 U. S., 222, interstate commerce was involved and the application of the Sherman Anti-Trust Law was sought, but the Court sustained and broadened an injunction under the State Anti-Trust Law.

In the case of M'Kinney v. Landon, 209 Fed., 300, Judge Hook, speaking for the Circuit Court of Appeals, held that a suit would lie under the State Anti-Trust Law against a corporation which was engaged both in interstate and intrastate business. He said:

> "The supremacy of the laws of the United States is not confined to those enacted pursu-

ant to the commerce clause of the Constitution, but extends with equal force and potency to all the subjects committed to Congress. In this respect there is nothing peculiar or exceptional in that subject of national jurisdiction. Legislation by Congress does not necessarily exclude or displace legislation of the States upon those aspects of a subject which are of local or State concern; for example: It is the settled law that the same act or series of acts may constitute a violation of the separate laws of both nation and State and that the offender may be prosecuted and punished in each jurisdiction (citing cases). It is no defense to a prosecution for a violation of the Anti-Trust Laws of the State, that the accused by the same general course of conduct has also violated the similar laws of the United States, or indeed has been punished therefor. The same reasoning applies when, as here, the proceeding is a civil action to enforce obedience to the law."

In the case of Standard Oil Co. of Kentucky v. State, 65 Southern, 468, the same question arose and the Supreme Court of Mississippi said:

> "A conspiracy which has for its object the creation of a monopoly only in that part of the commerce in a commody which is interstate, is subject only to the laws of the general government, and one which has for its object the creation of a monopoly only in that part of the commerce in a commodity which is intrastate is subject only to the laws of the States affected thereby; but one having for its object the creation of a monopoly in both the inter and intrastate commerce in a commodity is necessarily subject to the laws both of the general government and of the States affected thereby."

In the case of J. R. Watkins Medical Co. v.

Johnson, 162 S. W., 304 (Tex.), the question involved was whether a contract sued upon violated the State Anti-Trust Law, and the Court expressly recognized the doctrine that the transaction might be of so complex a character that both the State and Federal laws would be applicable. In deciding the case the Court quoted from the case of Fuqua v. Pabst Brewing Association, 90 Texas, 298, as follows:

> "So far the transaction was interstate commerce and not subject to State regulation without the consent of Congress, nor did the statute undertake in any way to regulate or prohibit the same. But the parties by the same contract voluntarily went further and so dealt with the subject after it had ceased to be an article of interstate commerce as to create a trust, as above shown in violation of the statute. * * * The commerce clause of the Constitution was not designed to protect the contractual rights of a person who thus voluntarily intermingles an otherwise legal interstate commerce transaction with an entirely local and unlawful one. We are therefore of the opinion that, independent of Congressional action, the contract sued upon was void."

See, also:

State v. Arkansas Lumber Co., 169 S. W., 145 (Mo.).
International Harvester Co. v. Commonwealth, 145 S. W., 393 (Ky.).
State v. Standard Oil Co., 116 S. W., 902 (Mo.); Aff'd in Standard Oil Co. v. Tenn. (*supra*).

It has been held that if the transaction is exclusively interstate, only the federal laws apply. In the case of Hadley Dean Plate Glass Co. v.

Highland Glass Co., 143 Fed., 242, the Highland Glass Company received an order for glass from the Hadley Dean Company, part of which was delivered, and then the Hadley Dean Company refused to go on with its contract. It was contended that the plaintiff could not recover because it was part of a combination to stifle competition both under the State and Federal Anti-Trust Laws. Upon this point, Mr. Justice Van Devanter, then speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

> "Of the State statute it is sufficient to say that it can have no application to the contract under consideration without impinging upon the exclusive authority of Congress to regulate commerce among the several States. (Railroad Co. v. Husen, 95 U. S. 465, 469, 24 L. ed., 527; Leisy v. Hardin, 135 U. S., 100, 10 Sup. Ct., 681, 34 L. ed., 128; Schollenberger v. Pennsylvania, 171 U. S., 1, 18 Sup. Ct., 757, 43 L. ed., 49; Addyston Pipe & Steel Co. v. United States, 175 U. S., 211, 229-233, 20 Sup. Ct., 96, 44 L. ed., 136; Stockard v. Morgan, 185 U. S., 27, 22 Sup. Ct., 576, 46 L. ed., 785). The contract was for the sale of glass to be manufactured by the vendor in Pennsylvania and delivered to the vendee in Missouri, and therefore directly related to interstate commerce (Addyston Pipe & Steel Co. v. United States, 175 U. S., 211, 246, 20 Sup. Ct., 96, 44 L. Ed., 136; Bement v. National Harrow Co., 186 U. S., 70, 92, 93, 22 Sup. Ct., 747, 46 L. ed., 1058; Montague v. Lowry, 193 U. S., 38, 47, 24 Sup. Ct., 307, 48 L. ed. 608)."

The same ruling was made in the case of the First National Bank v. Missouri Glass Co., 152 S. W., 378 (Mo.); Lock v. Citizens' Bank, 165 S. W., 536; Albertype v. Feist, 114 S. W., 791.

In some of these cited cases the members of

the combination which was challenged under the law, were engaged in both interstate and intrastate business, while the issues presented by the pleadings in the case at bar confine the complaints' transactions to interstate business. At the same time it is charged and proven that the combination of the defendants violates both the State and Federal laws and the complainants are injured by acts done in violation of both. It is beyond question that the defendants could be prosecuted for acts done in violation of both the State law and the Federal law in their respective jurisdictions, and it would therefore seem to follow on general principles that the complainants are entitled to an injunction for protection against such acts injurious to their business, which are in violation of both laws, irrespective of the question whether that business is interstate or not. State prohibitions against restraint of trade cannot well burden or obstruct interstate commerce and are not therefore to be tested by the same principles which concern the constitutionality of State acts that directly tax or burden trade.

Since we think State laws may be invoked as well as Federal laws, we proceed to show their application:

Section 340 of the General Business Law forbids "every contract, agreement, arrangement or combination" as follows:

> (a) "Whereby a monopoly in the manufacture, production or sale in this State of any article or commodity of common use, is or may be created, established or maintained."
>
> (b) "Whereby competition in this State in the supply or price of any such article or

commodity is or may be restrained or prevented."

(c) "Whereby, for the purpose of creating establishing or maintaining a monopoly within this State of the manufacture, production or sale of any such article or commodity, the free pursuit in this State of any lawful business, trade or occupation is or may be restricted or prevented."

Section 341 of the General Business Law provides that

> "every person or corporation or any officer or agent thereof who shall make or attempt to make or enter into any such combination, or who within this State shall do any act pursuant thereto or in, toward or for the consummation thereof wherever the same may have been made, is guilty of a misdemeanor, etc."

A number of fundamental propositions showing the scope and interpretation of this statute have already been settled by the New York State Courts, and we will deal with them severally before attempting to apply the statute to the acts of the defendants.

1. The Act contains no provision giving a party civil relief by way of damages or injunction, so any such right must be based on general principles which we now expound.

If the acts of the defendants constitute a misdemeanor under the terms of this statute, then the plaintiffs are entitled to all the appropriate and usual civil remedies, even though those remedies are not prescribed by the statute. It is the settled law of this State that one who is specially injured by an act forbidden by the criminal law is entitled to civil relief.

> "A civil action is maintainable by one who suffers injury as the result of a conspiracy forbidden by the criminal law, to recover the damages which he has sustained at the hands of the parties to the combination."
>
> Kellogg v. Sowerby, 190 N. Y., 370.

In the case of Rourke v. Elk Drug Co., 77 Supp., 374 (3rd Dept.), suit was brought by a private party under this anti-trust statute for damages, and the Court said:

> "The combination charged being prohibited and made criminal, every act of the defendants in furtherance of the object of the combination was unlawful, and any person suffering special injury on account of any such acts has a right of action."

In the case of Dueber Co. v. Howard Co., 24 Supp., 647, the Court expressly approved the rule laid down in the case of Steamship Company v. McGregor, 21 Q. B. Div., 544, as follows:

> "If the combination is unlawful, then the parties to it commit a misdemeanor and are offenders against the State, and if, as the result of such unlawful combination and misdemeanor, a private person receives a private injury, that gives to such person a right to private action."

This general rule has been discussed under our Point II. In New York State this rule has been applied in the case of Straus v. American Publishers' Association, 177 N. Y., 473; 193 N. Y., 496; 199 N. Y., 548; 231 U. S., 222, and it appears from an examination of the various opinions in that case that the issuance of the injunction was based solely upon the State anti-trust law. When the case was before the Appellate Division (85 App.

Div., 446), Judge Ingraham, writing the prevailing opinion, said:

> "Just what relief may be granted if the combination is prohibited by the statute, it is not important now to determine, for I take it that if the combination or arrangement as alleged in the complaint is declared by the statute to be against public policy, illegal and void, one who is directly affected by such an illegal combination or arrangement is entitled to appeal to the courts for redress, either to restrain the continuance of the illegal acts which result from the illegal combination, or to recover the damages caused by such combination."

This was also the accepted law in the case of Park & Sons v. National Druggists' Association, 175 N. Y., 1, and the case of Locker v. American Tobacco Co., 195 N. Y., 565 (121 App. Div., 443), where a private party sought an injunction against certain acts which injured him in his business, on the ground that such acts violated the State anti-trust law. While the injunction was denied, the opinions show that the court accepted the proposition that if the defendants were violating this anti-trust law and the plaintiffs were being injured through such violation, an injunction must issue. The court would have given no such exhaustive treatment to the substantive law on this subject if there had been any doubt as to the plaintiffs' standing under that law when injured by violations thereof.

This interpretation by the New York Court of Appeals of a New York State statute concludes the Federal courts on that point.

Robert Johnson Shoe Co. v. Dower
208 Fed., 266; 273;

National Cotton Oil Co. v. Anderson, 197 U. S., 115;
Snare & Triest Co. v. Friedman, 40 L. R. A. (N. S.), 393-6 (see Notes).

2. The statute is little more than a codification of the common law.

> "The statute which gave rise to this controversy is a continuation with some changes of a similiar act with the same title passed in 1897, which was the subject of consideration in the Matter of the Attorney General, 32 Misc. Rep., 1; 155 N. Y., 441; Laws of 1897, Chap. 383. * * * The general purpose of the act is expressed in its first section. Its object is to destroy monopolies in the manufacture and production in this State of commodities in common use, to prevent combinations in restraint of competition in the supply or price of such commodities or in restraint of the free pursuit of any lawful business, trade, or occupation. The act in this respect is little more than a codification of the common law upon the subject, and its validity to this extent is not and cannot be successfully questioned in view of a long line of authorities."
>
> Matter of Davies, 168 N. Y., 89.

See, also,

People v. American Ice Co., 120 Supp., 443.

3. To come within the meaning of this statute, the commodity or article affected by the combination need not be one of prime necessity, but only an article of common use.

Cummings v. Union Blue Stone Co., 164 N. Y., 401;
People v. Klaw, 106 Supp., 341;
People v. Duke, 44 Supp., 336;
DeWitt Wire Cloth Co. v. N. J. Wire Cloth Co., 14 Supp., 277.

Nor can there be any doubt that doors, sash, blinds, wood trim and other kinds of building material which enter into the construction of buildings are articles of common use within the meaning of the statute.

Cummings v. Union Blue Stone Co. (*supra*);
People v. Klaw (*supra*);
Knight & Jillson v. Miller, 87 N. E., 823 (Ind.).

The act applies to all commodities except those which are copyrighted or patented.

Straus v. Amer. Publishers' Assoc'n, 177 N. Y., 473.

4. Sec. 341 of the General Business Law, which we have cited, not only declares that any person who shall make or enter into such a combination is guilty of a misdemeanor, but also declares that every person is guilty of a misdemeanor who shall *attempt* to make or enter into such an arrangement or combination or who shall do any act toward or for the consummation thereof. It is therefore unnecessary to prove that the combination has been successful if it appears that the object is one forbidden by the statute.

"You will also note that by the statute, the 'attempt' to do the thing prohibited is condemned as well as the doing of the thing, and

one of the counts in this indictment charges the attempt to make and enter into an arrangement whereby a monopoly in the production and sale in this State of an article and commodity of common use might be created, established and maintained:"

People v. American Ice Co., 120 Supp., 443.

"A combination creating a monopoly of the sale of books not protected by copyright offends against the law of this State as much as if it related to Blue Stone (164 N. Y., 401), or to Envelopes (166 N. Y., 292), and according to this complaint, which must be accepted as true on this review, such an outcome is not only possible but probable; but it is not of moment whether such a result is probable or not, for the test to be applied is, *What may be done under the agreement?* * * * It is, of course, of no consequence how this course of action may be described by those who invented it, for if it be the fact that the combination which agrees to exclude others from an unprotected business violates the statute then it matters not what excuse may be offered for it. It is the excuse, not the statute, which must give way."

Straus v. Amer. Pub. Association (*supra*).

"Agreements to prevent competition in trade are in contemplation of law, injurious to trade because they are liable to be injuriously used. If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity

although the moral evidence might be very convincing."

People v. Sheldon, 139 N. Y., 251.

"The contract gave and was intended to give the parties of the second part, through the Standard Envelope Company, the exclusive right to fix prices at which manufacturers of envelopes should sell their output during the term fixed by the contract, the object being to secure a better price for the goods manufactured. Such a contract threatens a monopoly whereby trade in a useful article may be restrained and its price unreasonably enhanced, and it matters not that the parties to it may have so moderately advanced prices that the sum exacted for the product seems to some persons reasonable, for the scope of the contract, and not the possibility of self-restraint of the parties to it is the test of its validity."

Cohen v. Berlin & Jones Envelope Co., 166 N. Y., 293.

"The people have a right to the necessaries and conveniences of life at a price determined by the relation of supply and demand, and the law forbids any agreement or combination whereby that price is removed beyond the salutary influence of legitimate competition. * * * Nor is the operation of the rule forbidding contracts restricting competition and enhancing prices limited to trade in the necessaries of life, but, as appears from the citations above, extends equally and alike to all commodities of commerce. Neither need the agreement or combination in order to expose it to the denunciation of the law, constitute a complete monopoly or affect a total suppression of competition, but the language of courts and of writers is, that if the agreement or combination tends to monopoly or reduce or lessen competition, it is contrary to public policy and unlawful be-

cause operating *pro tanto* an artificial enhancement of price."

DeWitt Wire Cloth Co. v. N. J. Wire Cloth Co., 14 Supp., 277.

See, also.

U. S. v. Addystone Pipe & Steel Co., 85 Fed., 271.

5. The motive which actuates the members of the combination is immaterial, but the purpose and object of the combination is material.

"It is proper to say that we do not think that good motives on the part of those who enter into a combination in restraint of trade, save it from the condemnation of the law of this State (People v. Sheldon *supra*). The fact that the parties to an agreement of such a character may have honestly believed that it would be beneficial instead of injurious to commerce does not render it legal. The law denounces it if it is designed to prevent competition and will have that effect whatever the intent of the parties."

Kellogg v. Sowerby, 190 N. Y., 370.

"Whether it is or is not a violation of the statute depends upon the accompanying circumstances of the case and the purpose and object sought to be accomplished by the transaction. * * * Therefore, at the very outset in the determination of the issues presented, it becomes your duty to determine with which purpose and design these contracts were made and the restrictive clause against re-embarking in business was inserted. If made to create or foster a monopoly, the contracts are illegal and a violation of the act of 1899 (Laws of 1899, p. 1514, Ch. 690). * * * To vitiate such contracts as

the state act condemns, it need not be shown that the arrangement which the defendants made in fact resulted or might result in a total suppression of all competition, or might or would result in a complete and absolute monopoly of the ice business in the Borough of Manhattan. All that is essential is that it restrains competition and tends to deprive the public of the advantages which flow from free competition (Northern Securities v. U. S., 193 U. S., 332). * * * Therefore, if you shall find as a matter of fact that these contracts formed a part of an arrangement or scheme and were made for the purpose of creating, establishing or maintaining a monopoly, then the defendant is guilty of violating the statute, although it in fact did not afterwards raise prices. The guilt of the defendant does not depend on the question whether it in fact raised prices or whether attempting to do so it failed in its efforts to maintain them, so long as the contracts in their scope and provisions are such that competition in the price or supply of ice was or might be restrained or prevented. * * * It is not a question of whether the defendant was able to carry out its plans or realize its expectations, but whether, at the time these contracts were made, it was endeavoring to create and maintain a monopoly or restrain competition."

People v. American Ice Co., 120 Supp., 443.

It is the immediate purpose and not a remote purpose that is to be considered.

Schwarcz v. International Union, 124 Supp., 968.

It is not necessary for the plaintiff to show that the defendants bore any malice toward them

(State v. Minneapolis Milk Co., 144 N. W., 417 Minn.). If the plaintiffs are to prevail under this statute, it is because the acts of the defendants constitute a public offense forbidden by the statute and have resulted in injury to the plaintiffs.

6. The statute declares every combination of a certain character to be illegal and makes no distinction between the class of persons who compose the illegal combination. It is immaterial whether they be employers or employees, provided that the ends which they seek to attain violate the statute. A man may be a minister or a doctor, but he is subject like every one else to the prohibitions of this law. The fact that the defendants are endeavoring to suppress competition in the supply and price of completed articles in common use removes their combination and conduct from the case of National Protective Association v. Cummings, 170 N. Y., 315, and brings them within the purview of the anti-trust law.

> "The case is different with associations known as labor unions. The ostensible object of such association is a lawful one and has been so declared by the courts (Association v. Cummings, 170 N. Y., 315). What one member of such an association may lawfully do, the association may lawfully do, but the same theory does not hold with an association whose aim is to commit a statutory crime. Here nothing may be done in furtherance of the purpose for which it has combined. Every act is unlawful and for that reason a right of action accrues to each person who suffers an injury."
>
> Rourke v. Elk Drug Co., 77 Supp., 275.

In the case of Loewe v. Lawlor, 208 U. S., 274, this Court ruled that labor organizations come

within the provisions of such a law. In these days, when capital finds organized labor a convenient instrumentality for destroying the business of competitors, there can be no question but what the use of that instrumentality for the illegal purpose violates the statute.

To interpret the statute as applying to combinations of employers and not to combinations of employees would make it unconstitutional, for in this case employers and employees are members of the same combination. One cannot be innocent and the other guilty, for each is responsible for what the other does in furtherance of the common design (Cleland v. Anderson, 66 Neb., 252; 5 L. R. A. (N. S.), 136; Connolly v. Union Pipe Co., 184 U. S., 540; Cotton Oil Co. v. Texas, 197 U. S., 133; Niagara Ins. Co. v. Connell, 110 Fed., 816; Aiken v. Butler, 201 Ill., 236; Pierce v. Stablemen's Union, 103 Pac., 324; Fisher Flouring Mills v. Swanson, 137 Pac., 144; Brown & Allen v. Jacobs Pharmacy, 41 S. E., 553 (Ga.). The Court will avoid any construction which would lead to such a result.

7. If the combination of the defendants is illegal, then every act in furtherance thereof, though otherwise innocent and constitutionally protected, becomes illegal because done in furtherance of the illegal purpose. Acts which might be innocent when done by one person may become illegal when done by a number in combination in violation of the statute.

Rourke v. Elk Drug Co., 77 Supp., 375.

> "If there were any charge of combination between independent or distinct manufacturers or dealers in tobacco to refuse to sell the plaintiffs goods and thus boycott them, it

would be an actionable wrong and give rise to a cause of action under the authority of Straus v. American Pub. Assoc'n, 177 N. Y., 473. Nothing of this kind, however, is charged. The acts of the metropolitan company are alleged to have been done by it as agent of the American Tobacco Company. That company is purely a private corporation and stands before the law as to the control, management and disposition of its property the same as any individual, or person. It is unquestionable that the owner of property may sell to whom he chooses and equally he may control his agent. A refusal to sell to any particular individual becomes illegal only when it is done in pursuance of a combination with other owners to injure the individual with whom they refuse to deal. *In other words, it is the combination of several persons which makes that action illegal which, if done by a single person without any agreement for joint action, would be legal.*"

Locker v. American Tobacco Co., 195 N. Y., 565.

"Now, the American Tobacco Company, like any corporation or person, may lawfully refuse to sell its goods to the plaintiffs or to any person for any reason or no reason, at all events unless it has such a monopoly that sufficient tobacco goods can be got of no one else, which is not alleged. If, however, it should combine with other corporations or persons to do so, that would be a combination in restraint of trade and unlawful. The trouble with this complaint is that there is no allegation of such a combination."

Locker v. American Tobacco Co., 106 Supp., 118 (Judge Gaynor's opinion).

"The act (State Anti-Trust Act) was evi-

dently intended to prevent manufacturers or dealers in any article or commodity of common use from combining together to advance the price of such article or commodity by which competition in the supply or price of the same would be restricted or regulated. But a contract by a single manufacturer as to the price at which his goods when manufactured should be sold by those selected by him for the purpose of sale or distribution would not be a contract by which competition in the supply or price of the commodity would be restrained or prevented."

Walsh v. Dwight, 58 Supp., 91 (First Dept.).

Our review, therefore, of the State anti-trust law and the cases interpreting it, justify the following conclusions:

Acts in violation of that law may be enjoined by the injured party. *Any attempt* to create a monopoly or restrain competition in the supply or price of wood trim, violates the statute; it is not necessary to show that the attempt has been successful or the public has been injured thereby; laudable motives or excuses on the part of the parties to the combination are no defense if the object be to restrain competition or attain a monopoly; acts which are otherwise legal become illegal when done for the purpose of carrying out the illegal combination. The statute applies alike to all classes of citizens regardless of their station or occupation.

There seems to be no doubt or difference of opinion as to the application of the State anti-trust law to combinations of this character.

People v. McFarlin, 89 Supp., 527;
Irving v. Neal, 209 Fed., 471;

Paine v. Neal, 212 Fed., 259;
Gill Engraving Co. v. Doerr. 214 Fed., 111.

Let us see how the defendants' combination violates each of the three provisions of the State anti-trust law.

(a.) *Does not the defendant's combination seek to creat and maintain a monopoly in the manufacture, production and sale of the articles in question*? Their own reports show that they have already acquired a complete monopoly at higher prices of trade in wood trim on the Island of Manhattan, thereby terminating all trade in that borough with any open shops, including the complainants' large manufacturing customers in the adjoining Borough of Brooklyn. The history of trade combinations discloses no more remarkable example of monopoly maintained by the suppression of all competition on the part of outsiders.

> "And right at this point we may with perfect propriety say and charge you, that such a monopoly as we have defined, or the attempt to create one need not cover the entire territory of the Borough of Manhattan. If the monopoly sought to be established was one covering a part of the territory of the borough, of one district in the borough, so that the consumers in that portion of the city were deprived of the benefit of free competition, then the defendants would be just as guilty as though the monopoly extended to every foot of land within the boundaries of Manhattan. * * * To vitiate such contracts as the State Act condemns, it need not be shown that the arrangement which the defendant made in fact resulted or might result in a total suppression of all competition, or might or would result in a complete and ab-

solute monopoly of the ice business in the Borough of Manhattan."

People v. American Ice Co., 120 Supp., 443.

In the case at bar more than in the case of the American Ice Co. one is compelled to admit that a monopoly in the building business over a limited territory is baneful. The consumer in the Borough of Manhattan might go to the Borough of Brooklyn to buy his ice, but the man who owns land in Manhattan must have his building done on the island where that land is located. It is immaterial whether it is the Federal government, State government, the municipality or a private individual that attempts to erect a building upon land in the Island of Manhattan; in either instance it must be erected under union conditions and in either instance the combination of the defendants in suppressing trade in open shop articles precludes the purchase and use of such materials, although they are placed upon the market at lower prices than union materials of the same character. Here is a perfect example of an absolute monopoly and a complete denial to the public of the benefits of free competition. A land owner who is building simply cannot use non-union material.

(b.) *Does not the defendants' combination attempt to restrain or prevent competition in the supply and price of these articles?* Again the answer seems too obvious to admit of argument. The very objects which the defendants advance as a justification of their combination are objects which are only to be attained by the suppression of competition. Through the control of the building trades business by the defendants in league

with the other building trades unions, they prevent their employers, through fear of strikes, from purchasing materials where they can be secured at the best prices, in order thereby to throw the business into the union factories where their brother members are employed. The defendants have sought and attained a suppression of open shop competition and the obvious design and character of their rules and acts against open shop products admit of but one explanation. Through the repeated enforcement of these rules and the costly strikes which the builders have incurred in their attempts to resist them, non-union materials have been excluded from the market; their competitive value is destroyed and they cannot find purchasers at any price. Now, most buliders are bound by written agreement not to use non-union material at any price and competition and trade in non-union materials in Manhattan is not only restrained but annihilated.

3. *Does not the defendants' combination seek to restrain or prevent the free pursuit of a lawful trade or business, in order thereby to create or maintain a monopoly in the production and sale of these articles?* The combination of the defendants seeks to drive the non-union man and his open shop employer from the trade of erecting or manufacturing wood materials, in order thereby to create a monopoly for themselves in these two occupations. They not only agree to strike on any building where the non-union man is employed, but to order out 35 other trades for the same purpose and to strike on any building where wood materials are used which come from any employer who employs a non-union man. Large sums of money are spent in support of such strikes in

order to eventually unionize every mill in the United States.

The combination attempts to prevent the free pursuit of a lawful business by such manufacturers and non-union men, and this is done for the purpose of creating and maintaining a monopoly for the benefit of union men and those who employ them exclusively. This violates the statute.

The combinaiion undertakes to interfere with the free pursuit in this State of a lawful business in which any member of the community has a right to engage (Straus v. American Publishers' Assoc'n, *supra*).

(See also dissenting opinion, Jacobs v. Cohen, 183 N. Y., 207.)

Were there no cases in this State construing the anti-trust statute, we would feel confident that it was framed to apply to such combination as this case discloses. If there is such a thing as restraint of trade and suppression of competition within the borders of a single State, the situation in this case certainly comes under that description. The character of the combinations in restraint of trade which have been the subject of most of the litigation in this State, have been those combinations where the parties have by mutual and self-imposed restraints sought to benefit their own interests for the purpose of increasing their profits. The offense in this case is more aggravated because it aims at restraining third parties, involuntarily against their will, to submit to such restrictions.

If all of the builders in New York City had voluntarily made their agreement—for some reason we cannot now imagine—to purchase in the future

only union made materials at disadvantageous prices, then we would have a combination which violated the statute but which was self-imposed on the parties by mutual consent, for the purpose of excluding non-union material. In the case of bar, these builders have been coerced by the exigencies of their situation and the necessity of maintaining harmonious relations with the defendants, to enter into such an agreement at the special instance and demand of the union defendants. In the case of People v. McFarlin, 89 Supp., 527, an indictment was brought against certain officers of this same United Brotherhood because of a general movement which they had set on foot to unionize all of the mills of Rochester by refusing to work on non-union materials. In that case it appeared that the union was endeavoring to have the builders sign a certain agreement called Exhibit A, wherein the builders would agree not to handle non-union materials. The Court held that such agreements, even if made voluntarily by the builders, violated subdivision 6 of section 168 (now Sec. 580) of the Penal Code, and also the State anti-trust law, and said:

> "If this had succeeded, the defendants and their associates, it is stated, would be in a position materially to limit and restrain the entire business of construction of buildings and the manufacture of woodworking materials in Rochester, and to control the supply as well as the price of labor in those factories and on those buildings; and that would seem to be such a restraint upon trade and commerce as is condemned by subdivision 6, Sec. 168, of the Penal Code. The agreement, Exhibit A, in that feature, is against public policy, and harmful to the community, because it restrains competition and freedom of trade in articles of common necessity

(Judd v. Harrington, 139 N. Y., 105, 34 N. E. 790; People v. Sheldon, 139 N. Y., 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690; Straus v. American Pub. Ass'n, 177 N. Y., 473, 69 N. E., 1107; Adams v. Brennan, 177 Ill., 194, 52 N. E. 314, 42 L. A. R. 718, 69 Am. St. Rep. 222; Marshall v. City of Nashville, 109 Tenn., 495, 71 S. W., 815). The legislative policy of this State is consistent with the principles of common law in this respect. In addition to the prohibitions of the Penal Code, the recent statute against monopolies and restrictive trade agreements (Laws 1899, p. 1514, c. 690), is broad and sweeping in its declaration against all contracts or arrangements tending to promote monopolies or restrain competition in trade in articles in common use, and it makes it a misdemeanor to promote or enter into any contract or arrangement which is intended to and may produce that result. The only articles in common use excepted from the operation of the statute of 1899, are those covered by patent or other exclusive proprietary rights (Straus v. Am. Pub. Ass'n *supra*). But such an arrangement as we have been discussing, the parties thereto and its promoters are not the only ones affected. Whether the building contractors conceive it to be for their advantage, as a class voluntarily to enter into a contract which permanently abridges their purchasing privileges within limits to be fixed arbitrarily by a third party, or they are coerced into such agreement by said third party for the advantage of the latter, in either case the public is bound to be the loser. The welfare of the whole people is conserved by the open market and free competition among manufacturers in selling and builders in buying materials that go into the structures which the people need to have erected, and to protect the interests of the whole people the laws prohibiting contracts and arrangements in

restraint of trade and commerce are to be enforced."

People v. McFarlin (*supra*).

"It is one of such a combination among many dealers as threatened a monopoly with which the individual would be practically powerless to compete, and the many consumers who would be severally exposed and coerced would be either compelled to submit to its exactions or to forego the purchase of the commodity of customary use needful to them and, but for this monopoly, obtainable in the market at a reasonable price. The same evil principle pervades both large and small combinations. All are alike offenders, differing in degree but not in kind, and hence it is, that contracts by which the parties to them combine for the purpose of creating a monopoly in restraint of trade to prevent competition, to control and thus to limit production, to in crease prices and maintain them, are contrary to sound public policy and are void."

Cummings v. Union Blue Stone Co.,
164 N. Y., 401.

The doctrine of the foregoing cases is particularly applicable to the case at bar. Through their combination, the defendants make it impossible for the public to obtain the wood materials for the reasonable prices at which they are being offered on the market, because they forbid the builders over whom they have a dominating control, from purchasing them.

"Every producer or vendor of coal or other commodity has the right to use all legitimate efforts to obtain the best price for the article in which he deals, but when he endeavors to artificially enhance prices by suppressing or keeping out of the market the

> products of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, such arrangements are even more mischievous than combinations not to sell under an agreed price."
>
> Arnot v. Pittston, etc., Coal Co., 68 N. Y., 558.

Since the combination is to prevent competition in articles in common use, for the purpose of excluding from the market those competing articles which are offered at the lowest prices, it is immaterial whether the purpose of the conspirators is the increase of the profits of the employer of the employees, or both, or whether the motive is a laudable and patriotic one or an oppressive one.

> "It is of course of no consequence how this course of action may be described by those who invented it. For if it be the fact that the combination which agreed to exclude others from an unprotected business violates the statute, then it matters not what excuse may be offered for it. It is the excuse, not the statute, which must give way."
>
> Straus v. Am. Pub. Ass'n (*supra*).

The defendants' restraint of trade is not incidental to any legitmiate end which the defendants seek, but is the direct purpose of the combination. The benefits sought by the defendants are the result of the restraint of trade, and the restraint of trade is not the result of the benefits or incidental to them. The defendants seek a larger income for the union mills and their employees, but their only method of obtaining this benefit is the suppression of competition in commodities produced by outsiders. They cannot seek this lawful end through illegal means—viz., the suppression of competition in non-union commodities. Every illegal trust pursues the same legal end.

POINT V.

The defendants' combination violates Subdivision 6 of Section 580 of Article 54 of the Penal Law.

Subdivision 6 of Section 580 of the Penal Law provides:

> "If two or more persons conspire to commit any act injurious * * * to trade or commerce * * * each of them is guilty of a misdemeanor." (Formerly part of Sec. 168 of the Penal Code.)

In a number of cases, our courts have construed this phrase to mean the suppression of competition.

> "It is a misdemeanor under the laws of this State for two or more persons to conspire to commit any act injurious to trade or commerce (Penal Code, Section 168, Subdivision 6). The prevention of competition in business is an act injurious to trade in contemplation of law (People v. Sheldon, 139 N. Y., 251).
>
> Kellogg v. Sowerby, 190 N. Y., 370.

A boycott is an act injurous to trade or commerce.

> Peel Splint Coal Co. v. State, 36 W. Va., 902.

To injure trade is the same as restraining trade.

> U. S. v. Debs, 64 Fed., 724.

"The *gravaman* of the offense of conspir-

> acy is the combination. Agreements to prevent competition in trade are in contemplation of law injurious to trade, because they are liable to be injuriously used."
>
> People v. Sheldon, 139 N. Y., 251.

In the case of Leonard v. Poole, 114 N. Y., 371, the Court had under advisement the legality of a combination to advance the price of lard by cornering the market and said:

> "When the transactions out of which this action arose were being carried on, the statutes of this state provided that if two or more persons conspire to commit any act injurious to trade or commerce, each of them is guilty of a misdemeanor (2 R. S., 692, Sec. 8, subdiv. 6). The same provision is contained in the Penal Code, sec. 168. The scheme entered into by the parties to the contract of August 13, 1879, was an indictable misdemeanor."

In the case of People v McFarlin (*supra*), the defendants endeavored to compel the builders of Rochester to sign agreements not to use open-shop material, which agreements were referred to in the case as Exhibit A. In refering to the attempts to bring about the execution of these agreements by builders, the Court said:

> "So far as the carpenter contractors are concerned, it does not appear by the indictment that there was any question between them and their employees as to wages, but it seems that they were threatened with a boycott unless they signed an agreement (Exhibit A) to purchase materials only of such factories as had received the approval of the union. If this had succeeded, the defendants and their associates, it is stated, would be in a position to limit and restrain the entire business of construction of buildings and the manufacture of woodworking material in

> Rochester and to control the supply as well as the price of labor in these factories and on those buildings, and that would seem to be such a restraint upon trade and commerce as is condemned by subdivision 6, sec. 168 of the Penal Code."
>
> 89 Supp., 527.

To the same effect are the following cases:

> Irving v. Neal, 209 Fed., 471;
> Paine v. Neal, 212 Fed., 259.

This section of the Penal Code coupled with the Anti-Trust Law emphasizes the fact that the policy of the State of New York as expressed in its statutes and decisions condemns all obstructions to competition and protects the right of the individual citizen to pursue his trade and market his goods, without artificial or unreasonable obstruction from any combination of citizens. The arguments submitted to show the application of the anti-trust law to this combination are most of them applicable to this Subdivision 6 of Section 580 of the Penal Law. Surely the plaintiffs are entitled to an injunction against acts which violate this law, and injure them in their property rights.

POINT VI.

The combination of the defendants violates Subdivision 5 of Section 580 of the Penal Law.

Subdivision 5 of Section 580 of the Penal Law provides:

> "If two or more persons conspire to prevent another from exercising a lawful trade or calling or doing any other lawful act, by force, threats, intimidation or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof, each of them is guilty of a misdemeanor." (Formerly part of Sec. 168, of the Penal Code.)

The plaintiffs contend that the defendants have combined to prevent the non-union employees of the plaintiffs from pursuing their lawful trade and business.

In the case of People v. Davis, 159 App. Div., 464, an indictment under this provision of the Penal Law was upheld in a case against members of a combination to prevent a horseshoer from pursuing his lawful trade by threatening strikes on all works where horses were used which were shod by the horseshoer. The Court also approved the decision in the case of Newton v. Erickson, 70 Misc., 291, which involved the same combination of carpenters as the case at bar.

In the case of People v. McFarlin, 89 Supp., 527, which was a prosecution against the officers of this same Brotherhood of Carpenters for acts of the same character, the Court held that the combination of the carpenters to drive out the non-union concerns was in violation of this section of the Penal Law, and said:

"A praiseworthy end does not justify the employment of unlawful means, and if in order ultimately to effectuate the betterment of the condition of the members, the defendants maliciously and with the immediate and direct intention to work an injury conspired to deprive non-union men of all means of living and to bring about the destruction of property of any one standing out against their demands, the statute was violated. And one's business is property."

People v. McFarlin (*supra*).

"Individuals who by unlawful combinations seek to interfere with the trade, business or occupation of others with a view of injuring or embarrassing them in the prosecution of such trade or business are subject to the penalties of the criminal law and become liable to criminal prosecution on behalf of the people. Penal Code, sec. 168."

Thomas v. M. M. P. Union, 121 N. Y., 50.

See, also,

Davis v. Zimmerman, 36 Supp., 303 (1st Dept.).

"It seems that there must be a corrupt agreement between two or more individuals entered into with a criminal intent to do an unlawful act, which must be followed by the doing of an unlawful act, and that the motive for the agreement is to prevent some one from exercising a lawful trade or calling, since a conspiracy is a combination to do an illegal act by legal means or any act by illegal means."

People v. Klaw, 106 Supp., 341.

See, also,

Newton v. Erickson, 126 Supp., 949.

POINT VII.

The defendants' combination violates Section 530 of Article 48 of the Penal Law.

Section 530 of the Penal Law provides:

> "That any person who, with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully, uses violence or inflicts injury upon such other person or his family or a member thereof, or upon his property or threatens such violence or injury, etc., is guilty of a misdemeanor."

We know of no case construing this law, but its application to the facts of the case at bar seems obvious. The defendants are seeking to compel the plaintiffs to employ union men exclusively and the plaintiffs have a perfect right to refuse to so run their business. In order to compel the plaintiffs to join the combination the defendants inflict injury upon the property of the plaintiffs, by destroying their good will and trade. It is now well settled in New York State that business and trade is property in the sense in which that word is used in this law.

People v. Barondess, 16 Supp., 436; opinion of Daniels, *J.*, adopted in 133 N. Y., 649;
People v. Warden, 130 Supp., 698; affirmed 190 N. Y., 537;
People v. Hughes, 137 N. Y., 29;
People v. Hawkins, 157 N. Y., 1;
Davis v. Zimmerman, 36 Supp., 304;

Matthews v. Shankland, 56 Supp., 139;
People v. McFarlin, 89 Supp., 527.

Judge Blackmar points out in his opinion in the case of Newton v. Erickson, 126 Supp., 949, that the trade and good will of a business is often more valuable property than a man's machinery or buildings. The attack upon the plaintiffs, therefore, seems to come within the definition of this Penal Law because it is an infliction of injury upon the plaintiffs' property for the purpose of compelling them to do certain things which they have a legal right not to do.

The State of Connecticut has long had a statute which has been construed by its Supreme Court in several instances and which corresponds in essential particulars to this Penal Code of the State of New York. Connecticut statute says:

> "every person who shall threaten or use any means to intimidate any person to compel such person against his will to do or abstain from doing any act which such person has a legal right to do or shall persistenly follow such person in a disorderly manner, or injure or threaten to injure his property with intent to intimidate him, shall upon conviction be liable, etc."

This statute has been construed to apply to cases involving the boycott of an employer and attempts to bring about the discharge of non-union workingmen.

State v. Glidden, 55 Conn., 47.
Wyeman v. Deady, 79 Conn., 414.

The reasoning of these cases is persuasive on

the question of the application of the New York State Penal Law to the combination of the defendants. The cases cited on the subject of business as property, hold that extortion may be exercise through strikes and threats thereof and therefor sustain our position.

POINT VIII.

Section 582 of the Penal Law of the State of New York is declaratory of the common law and does not legalize the defendants' acts.

Special stress has been laid on Section 582 of the Penal Law, passed in 1882, which says:

> "No conspiracy is punishable *criminally* unless it is one of those enunciated in the last two sections, and an orderly and peaceable assembling or co-operation of persons employed in any calling, trade, or handicraft for the purpose of obtaining an advance in the rate of wages or compensation, or of maintaining such rate, is not a conspiracy."

A. This law was passed long before the State Anti-Trust Law, and if in conflict therewith, the State Anti-Trust Law must prevail.

B. It is expressly limited to orderly strikes to obtain an advance in wages for the strikers, and is merely declaratory of the common law. It is not permissive as to combinations to injure property or restrain trade, which are illegal.

C. It is a part of the Penal Law and only intended to affect criminal punishment. The law does not say that such acts shall be lawful, but only that they shall not be "*punishable crimin-*

ally.'' It does not alter the civil rights of the parties, as has been determined in other cases where similar statutes were construed.

Frank v. Herold, 52 Atl., 152 N. J. (Pitney, V. C.);
Erdman v. Mitchell, 207 Pa. St., 79;
Goldberg v. Stablemen's Union, 86 Pac., 896; 8 L. R. A. (N. S.), 460.

Evidently the courts of New York State do not believe that this law has wiped out either civil or criminal liability for combinations of the kind presented in this case, for there have been many subsequent decisions.

People v. Davis, 159 App. Div., 464;
Thomas v. M. M. P. Union, 121 N. Y., 50;
Matthews v. Shankland, 56 Supp., 123;
People v. McFarlin, 89 Supp., 527;
Schlang v. Ladies' Waist Workers, 124 Supp., 289;
Newton v. Erickson, 126 Supp., 949; 150 Supp., 1073 App. Div.;
Beattie v. Callahan, 81 Supp., 413;
Coons v. Chrystie, 53 Supp., 668;
Curran v. Galen, 152 N. Y., 33;
McCord v. Thompson-Starrett Co., 113 Supp., 383;
Schwarcz v. International Union, 124 Supp., 968.

POINT IX.

A combination of traders to promote their own interests by suppressing the competition of rivals, is illegal at common law and it is immaterial whether the combination aims at one rival or a class of rivals.

At common law all combinations which have the objective purpose of suppressing the competition of trade rivals who are unwilling to join in the combination, were illegal, and those injured thereby were entitled to th appropriate civil remedies. The Federal and State Anti-Trust Laws both forbid such combinations and are held to be declaratory of the common law in this respect. We invoke the common law on two grounds:

1. If the complainants are being irreparably injured in their property rights by unlawful acts committed within the State, they would be entitled to relief regardless of the existing Federal Law, whether those acts were unlawful at common law or because of some State statute. There would be no necessary conflict with the Federal law as has been argued in Point IV of this brief.

2. Neither does the Federal law prevent the common law being invoked so far as the combination relates to interstate commerce exclusively, because there can be no conflict between them. The Federal law is but declaratory of the common law. If there were any conflict, the common law would have to yield, for the courts could not uphold as lawful, combinations in restraint of interstate trade which the Federal law declared to be unlawful. Neither could the courts

declare to be unlawful, combinations in restraint of trade which the Federal law held to be lawful. The creation of new remedies for the old offense, however, which remedies were not available at the common law, does not exclude resort to remedies available at common law. The Federal law specifies the remedies of government injunction, treble damages, and confiscation, none of which was generally available at common law, and makes restraints of trade, which were purely subjective, affirmatively unlawful so that third parties injured thereby may recover.

> "Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were null and void and were not enforced by the courts (citing cases). The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense and punishable as a misdemeanor, and to create a right of civil action for damages in favor of those injured thereby, and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such restraints."
>
> U. S. v. Addyston Pipe & Steel Co., 85 Fed., 278.

In the case of contracts and combinations which aim to injure and exclude outsiders, however, a party had a cause of action at common law even in the absence of statute.

> Brown & Allen v. Jacobs Pharmacy, 41 S. E., 553 (Ga.), 57 L. R. A., 47.

It has been generally recognized that the com-

mon law remedies have not been superseded by the Sherman Anti-Trust Law.

Leonard v. Abner-Drury Brewing Co., 25 App. D. C. Cas., 161;
Evenson v. Spaulding, 150 Fed., 517;
Loewe v. California State Federation, 139 Fed., 71;
Irving v. Joint District Council, 180 Fed., 896;
National Fireproofing Co. v. Mason Builders, 169 Fed., 259;
Montgomery, Ward & Co. v. South Dakota Ass'n, 150 Fed., 413;
American Federation of Labor v. Bucks Stove & Range Co., 33 App. D. C., 516; 221 U. S., 419; 55 L. Ed., 797.

In the case of Leonard v. Abner-Drury Brewing Co. (*supra*), the Court said:

> "That the statute makes a conspiracy in restraint of trade a crime and provides a severe penalty therefor, does not necessarily impair the ordinary jurisdiction of equity where the criminal acts work irreparable injury to property (*Re* Debs, 158 U. S., 564, 593, 39 L. Ed., 1092, 1106, 15 Sup. Ct. Rep., 900). And whatever may be the rule of its enforcement generally, neither by express terms nor necessary implication does it undertake to completely substitute its remedies for all others which any person might have had before its enactment. As the complainant's right to a remedy in equity can be maintained without regard to the act of Congress, it is not essential to determine whether, if the wrongs complained of would be remediless save by resort to that act, any person other than the United States can invoke the jurisdiction of equity to restrain their commission."

In the case of *in re* Debs, 158 U. S., 564, the Court recognized that the remedy of injunction in behalf of the government against combinations obstructing interstate trade, existed irrespective of the Federal Anti-Trust Law. We therefore review the common law cases relative to such combinations.

If the means employed by the combination are illegal because they seek to deprive the public of the benefits of their rivals' competition, then it is immaterial whether those means are employed against one person or an entire class. A combination to drive the complainants and all of their non-union employees out of business is equally illegal, whether or not the same illegal acts are being carried out as to all other non-union concerns. If the means are legal, they do not lose their innocence because they are directed toward one rival and not toward an entire class. If the combination be one which "aims at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes," then it offends the common law according to the decision of Loewe v. Lawlor (*supra*), and it is immaterial whether the persons it seeks to compel are one or many.

Justice Holmes in his dissenting opinion in the case of Vegelahan v. Guntner, 167 Mass., 92, says:

> "The policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business by such means when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade. In such case

it cannot matter whether the plaintiff is the only rival of the defendant and so is aimed at specifically, or is one of a class all of whom are hit. The only debatable ground is the nature of the means by which such damage may be inflicted."

In the case of Hawarden v. Youghiogheny & Lehigh Coal Co., 111 Wis., 545 (55 L. R. A., 828), the defendants were seeking to protect themselves against the competition of a certain class of retailers and the plaintiff, a retail dealer, brought this action for damages and an injunction in behalf of himself and other retailers similarly affected by the defendant combination.

The Court summarized the case as follows:

"The wholesalers owned practically all the coal docks at Superior and Duluth, and that the retailer cannot carry on his business at Superior unless he can buy of the wholesalers freely and without discrimination. That the wholesalers entered into a combination with the defendant retailers by which it was agreed that the wholesalers should sell to the defendant retailers and to none others, for the purpose among others of forcing out of the retail trade all retailers not in the combination, and among others, the plaintiff. That such agreement or conspiracy has been successful and as a result thereof the plaintiff's business has been destroyed to his damage. Do these facts constitute a cause of action at common law? We think they do."

The Court found that the combination was one to injure the plaintiff and others, and therefore illegal.

"On the second count the plaintiff attempts on behalf of a class of persons, namely, the retailers who were excluded from the combination, to obtain equitable relief by way of

a perpetual injunction restraining the continuance of the operations of the conspiracy. That Courts of Equity have jurisdiction to restrain such conspiracies when irreparable injury will result and legal remedies will prove inadequate or a multiplicity of suits be necessary, *seem to be well settled and that a conspiracy may be directed against a considerable number of persons as well as against one, cannot be doubted.* We have, therefore, before us an unlawful conspiracy directed against a large number of persons which has already resulted in driving out of business a considerable number of such persons, and which the defendants threaten to continue indefinitely against the whole class."

In the case of Bailey v. Association of Plumbers, 52 S. W., 853 (Tenn.), the defendant association of plumbers adopted by-laws for their own benefit forbidding its members purchasing materials from any manufacturer or jobber who sold materials to non-members, and from any jobber who dealt with the manufacturer who sold to non-members. The Court said:

"By-laws with such capabilities import, and design, are clearly obnoxious to the common law, as well as violative of our statutes."

"Manifestly these provisions were intended to restrain all members of the association in their purchases of 'supplies' and 'materials,' and all dealers who sell to them, in their sales; and at the same time to embarrass non-members, and 'boycott' dealers who sell to them. The restraint is fourfold. It operates upon members and upon dealers who sell to them, upon non-members and upon dealers who sell to them; and in each of the four particulars it interrupts that freedom in trade to which all of them were otherwise

entitled, and which the public is interested to have them enjoy. All members and all non-members were of right entitled to buy from any and all dealers, at their election, yet the members are restricted to dealers who sell to none but members, and non-members are restricted to dealers who sell to none but non-members; and likewise, all dealers were of right entitled to sell to all persons who desired to purchase, yet those of them who sell to members are forbidden to sell to others, and those who sell to others are thereby deprived of sales to members. Thus and to this extent the public loses the benefit of fair and free competition, which it is always entitled to have. *These by-laws virtually divided the trade in plumbing materials and supplies for Memphis into two main parts, in the nature of combinations, one of them being represented by members of the association and dealers who sell to them alone, and the other being represented by non-members and dealers who sell to them alone; and thereby the two classes are intended to be arrayed against each other not in fair and free competition, but with a view to the ultimate demoliton of the latter class and the entire control of the trade by the former class.* The underlying thought is the destruction of all competition with non-members, by driving them out of the business, and the acquisition of the whole trade for members, whose competition among themselves and whose prices to customers are subject to the illegal rule already considered."

There are many cases of illegal combinations where the sole objection to the injured party is not a personal one, but is because he is not a member of the offending association, just as in the case at bar.

The case of Walsh v. Association of Master Plumbers, 71 S. W., 455, was an application for

an injunction to restrain an agreement between the Plumbers' Association and dealers and manufacturers of plumbers' supplies, whereby the latter agreed not to sell to any one except members of the defendant association, and the members of said association agreed not to deal with any person who sold to a non-member.

The Court held that the common law remedies were not abridged by the State Anti-Trust Law, and that the defendant who was prevented by this agreement from purchasing supplies to do his work had a cause of action at common law.

> "The contract being unlawful, it remains to be seen whether or not the appellant's private rights were obstructed or interfered with as the result of the illegal agreement. The petition alleges that they were; that he was unable to purchase supplies on account of said agreement with which to do his work and was prevented from taking plumbers' contracts for the reason he could not procure the supplies necessary to fill the contracts. That the only reason the respondent corporations have for refusing to sell him supplies is because he is not a member of the Association of Master Plumbers, and that one of the purposes of the illegal agreement is to coerce him to become a member of said association.
>
> "There can be no question that the agreement between the respondents is an illegal conspiracy and that its effect is to inflict a civil wrong upon appellant and that this wrong is a continuing one and according to all the authorities, entitled the appellant to injunctive relief so far as a court of equity is authorized to administer it, within the bounds of equitable jurisprudence. *We think it is competent for the Court to declare the agreement complained of as illegal and void and to restrain the parties to the agreement from*

keeping its terms or demanding that they be kept and thus leave the respondent corporations and each of them free to deal or not to deal with the appellant, as they may choose.''

In the case of Gatzow v. Buening, 106 Wis., 1 (49 L. R. A., 475), defendant was secretary of a Liverymen Association which in its by-laws provided that no member should do business with any one who did not patronize its members exclusively or with undertakers who dealt with non-members. The plaintiff hired Nieman, an outsider, as an undertaker and also a liveryman by the name of Schubert who was a member of the association. Schubert did not know that Nieman was to be employed, but in the midst of the funeral was visited by the secretary of the union who had just learned that the by-laws were being violated, and told to withdraw his hearse and carriage in accordance with the by-laws, which was done. There was also evidence tending to show a combination to prevent competition and fix prices in the business. The defendants did not have the plaintiff in mind when they made the by-laws and apparently had no intention of injuring him except in so far as he was incidentally injured by the uniform enforcement of the by-laws.

> ''A combination to do an act tending necessary to prejudice the public or oppress individuals by unjustly subjecting them to the power of confederates and give effect to the purposes of the latter, whether of extortion or mischief, is unlawful. * * * If an unlawful combination exist, it is none the less unlawful because existing under a self-imposed constitution and governed by by-laws and because it conducts its operations in a public or semi-public way asserting the right,

> in pursuit of its purposes, to interfere with the individual liberty and with the public interests. In a proceeding for damages for wrongdoing by such combination to the special injury of an individual, the constitution and by-laws of the association and protests of its members of innocence of bad intent and of adherence to the obligations of their association, however innocent may be its name, to prevent incurring its penalties, will constitute no protection whatever as regards compensatory damages to a person specially injured by overt acts of its members in pursuit of the purposes of the conspiracy."

Numerous cases of trade fights between competitors will establish the fact that a competitive relation does not justify such methods of restraining and destroying the trade of business rivals.

In the case of Martell v. White, 185 Mass., 255 (64 L. R. A., 260), the defendant association of manufacturers, etc., of stone enacted laws providing that members dealing with non-members should contribute so much to the expenses of the association. In pursuance of this law assessments were levied from ten to one hundred dollars for dealing with a party "not a member," but the members knew that this meant the plaintiff. The object of the defendants was to protect their own business by suppressing a competitor who injured them by not conforming to their rules.

> "It may be assumed that one of the objects was to enable the members to compete more successfully with others in the same business and that the acts of which the plaintiff complains were done for the ultimate protection and advancement of their business interests with no intent or desire to injure the plaintiff except so far as such injury was the necessary result of measures taken for their own interests. If that was true, then

so far as respects the end sought, the conspiracy does not seem to have been illegal."

The Court then turned its attention to the methods employed to carry on the so-called right of competition and said:

> "The fact, therefore, that the plaintiff was vanquished is not enough, provided that the contest was carried on within the rules allowable in such warfare. It is a right, however, which is to be exercised with reference to the existence of similar rights on th part of others. The trader has not a free lance. Fight he may, but as a soldier, not as a guerrilla. The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation and that this end is best attained when the trader is allowed in his business to make free use of these laws. He may praise his wares, may offer more advantageous terms than his rivals, may sell at less than cost * * * But from the very nature of the case it is manifest that the right of competition furnishes no justification for an act done by the use of means which in their nature are in violation of the principle upon which it rests. The weapons used by the trader who relies upon this right for justification must be those furnished by the laws of trade or at least must not be inconsistent with their free operation."

In the case of Boutwell v. Marr, 71 Vt., 1 (43 L. R. A., 803), the plaintiff engaged in the business of polishing granite, and defendant association of granite manufacturers controlling 95% of the granite, passed a resolution not to sell to any person not a member of the association. The plaintiff refused to join the association and his

business was ruined. A fine of fifty dollars was imposed upon members of the association for not abiding by its rules. There did not seem to be any other objection to the plaintiff than the fact that he would not join the association.

> "Without undertaking to designate with precision the lawful limit of organized effort, it may safely be affirmed that when the will of the majority of an organized body in matters involving the rights of outside parties is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation. The withdrawal of patronage by concerted action, if legal in itself, becomes illegal when concert of action is procured by coercion. In this case it could easily be found that a fine of fifty dollars for a violation of the rules was not intended to be applied to rules adopted to secure performance of the ordinary duties of membership. If in fact designed to hold unwilling members to unity of action in an aggressive movement of unlawful character, the defendants cannot complain if the law so treats it. * * * The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible and the standing threat of their imposition may properly be classed with the ordinary threats of suits upon groundless claims. The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body cannot change the result. The law sees in membership of an association of this character both the authors of its coercive system and the victims of its unlawful pressure. * * * But it can hardly be supposed that the defendants' organization reached its present proportions without some previous use of the methods disclosed by the evidence above

cited, and as far as its membership was due to coercion, there was a further element of unlawful pressure in the enforcement of united action against the defendants."

In the case of Hitchman Coal & Coke Co. v Mitchell, 202 Fed., 512 (rev'd 214 Fed., 685), it appeared that the united mining workers had made an agreement with the mine owners of Ohio, Indiana, etc., to observe the eight-hour day and make other concessions to the workers, but that these concessions were made,

> "with the distinct understanding and explicit promise of the miners to give to the operators of the four contracting States, adequate protection against the competition of the unorganized field."

As a result of these concessions to the miners, both the operators and miners in Ohio and Indiana, began to feel the effects of the competition of West Virginia, which remained unorganized. The miners thereafter determined to "organize West Virginia in order that the miners of Ohio or Indiana can get more work." The Court said:

> "In 1890 as an organization they entered into a contract with the operators of that field for and in consideration of an eight-hour labor day and other concessions to organize the West Virginia miners, and by reason of the control they would have under the Union Laws, over such miners when so organized, *protect* these operators in Ohio, Western Pennsylvania, Indiana and Illinois from the existing open competition even then threatening the markets of such operators, especially in the West and the Lake regions. * * * All the evidence in this record goes to show pretty conclusively that the fourteen years' struggle of this labor organization since it

entered into the compact with the operators of Ohio, Western Pennsylvania, Indiana and Illinois in 1898, to unionize the operations in West Virginia, has not been in the interest either of the betterment of mine labor in the State, or of upholding that free commerce in coal between the States guaranteed by Federal Law, but to restrain and even destroy it in West Virginia, for the benefit of these unionized competitive states. It may be unfortunate for these states that nature has favored West Virginia, Kentucky and the other Southern States by giving them better coal and less expensive mining conditions, but this does not warrant the operators and miners there to combine and confederate for the purpose of depriving the consuming public of the right to purchase a better coal at the lowest prices if desired. Such a combination is clearly a common law conspiracy too far-reaching to be reasonable in restraint of trade, as well in my judgment a direct violation of the Sherman Anti-Trust Law. It is further in my judgment a combination or conspiracy against the rights of the many thousands of non-union miners in West Virginia who are entitled to enjoy the advantages in their labor that nature has given them."

In the case of Employing Printers' Club v. Dr. Blosser, 122 Ga., 509 (69 L. R. A., 90), the defendant combination of printers formed to fix prices, sought to protect themselves from the plaintiff's competition by calling strikes on him after he had withdrawn from their association. The printers' organization had an agreement with the Printers' Union "that the unions would not permit their members to work for any employer who was not a party to the agreement," and merely insisted that the union keep this agreement by withdrawing the union printers from the

plaintiff's establishment after the plaintiff had severed his connection with their organization. An injunction was issued, and the Court said:

> "A court of equity will interpose by injunction to prevent the several members of an illegal combination from enforcing an agreement to the hurt and injury of one engaged in a competitive business. Under the facts in the records, the court properly enjoined the defendants from interfering with the plaintiff's business as a printer, engaged in competitive trade and from unlawfully influencing the labor organization from obstructing its business."

The case of Brown & Allen v. Jacobs Pharmacy, 41 S. E., 553 (Ga.), 57 L. R. A., 47, was a suit for injunction and damages brought by Jacobs Pharmacy, a retail druggist, against a combination of retailers who agreed not to deal with any wholesaler or manufacturer who were not members of the Druggists' Association or who had been designated as aggressive cutters. The plaintiff being designated an aggressive cutter found himself unable to purchase the necessary merchandise. As a defense for their action the defendants contended "that they were only seeking to defend themselves." This, therefore, was a combination to get rid of the plaintiff's competition and benefit the defendants.

> "The next position of the defendants and the one which on first presentation seems to be their strongest defense on this part of the case, is that at common law contracts or agreements in general or unreasonable restraint of trade were merely void and unenforcible; that either party could defend against an action based on them, but that they were not illegal in such sense as to give

a right of action to third parties. While there may be conflict among the authorities, it seems to us that such confusion might have been avoided by bearing in mind the distinction between a contract or agreement merely in restraint of trade as between the parties, and a combination or contract to stifle competition or a conspiracy to ruin a competitor. * * * Each member of the association had a perfect right to buy material and supplies exclusively from any dealer or dealers he might choose, and each dealer had an equal right to select members for his customers and confine his sales to them only. These were inherent rights which no competitor was authorized to dispute, no court empowered to control or curtail. But in our opinion, it does not follow from this undoubted freedom of individual member and of individual dealer that all of the members may, as ruled in those cases, lawfully enter into a general and unlimited agreement in the form of by-laws that they and all of them will make their purchases from only such dealers as will sell to members exclusively."

In the case of Purington v. Hinchliff, 76 N. E., 47, the defendants Mason Builders' Association of Chicago, included in its membership about two-thirds of the mason builders and constructed about ninety-five per cent. of the brickwork. It entered into an arrangement or agreement with the brick manufacturers whereby the brick manufacturers agreed to allow the members of the Mason Builders' Association a trade discount and the builders agreed to buy all of their brick from the members of the manufacturers' association, while the bricklayers' union agreed that none of its members should use brick produced by any other manufacturers. As a result of this combination, the plaintiff was deprived of his business

in Cook County, because the bricklayers were directed not to lay their brick and the mason builders were compelled to stop using them. It does not appear that there was any other malice against the plaintiff than the desire to protect the defendants against his competition as a brick manufacturer, but the Court held the combination to be illegal, saying:

> "No person or combination of persons can legally by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business, and any loss willfully caused by such interference will give the party injured a right of action for all damages sustained. All parties to a conspiracy to ruin the business of another because of his refusal to do some act against his will or judgment, are liable for all other acts illegally done pursuant to such conspiracy and for the subsequent loss, whether they were active participants or not."

The case of Doremus v. Hennessy, 176 Ill., 608 (47 L. R. A., 797), is an example of a secondary boycott to get rid of a competitor because their prices were too low and their competition injurious. The destruction of their business was for the benefit of the conspirators but the Court construed it as a wanton and malicious conspiracy to injure.

The case of Jackson v. Stanfield, 137 Ind., 572 (23 L. R. A., 588), involved a combination of 150 retail lumber dealers called the Retail Lumber Dealers' Association, which enacted by-laws forbidding its members dealing with manufacturers or wholesalers who sold any one but a regular retail dealer. The object was to protect themselves against lumpers and men who had no permanent

business establishment and could therefore undersell. A sale having been made by a wholesaler to the plaintiff, who was not a regular dealer, a penalty was exacted and the plaintiff was thereafter deprived of his necessary supply of merchandise to his injury. There was no malice toward the plaintiff, as he was simply a member of the proscribed class. It was contended by the defendants "that the plaintiffs were only incidentally injured," but the Court said:

> "Such rules contravene the rights of nonmembers to earn their living by fair competition."

The case of Retail Lumber Dealers' Association v. State, 48 So., 1021 (Miss.), involved a similar combination of retail lumber dealers to protect themselves from competition on the part of wholesalers by agreeing not to deal with any wholesaler who sold directly to the consumer or to any retailer not carrying a certain amount of stock. The Court stated that the case of Bohn v. Hollis, 54 Minn., 223, and Montgomery Ward case, 150 Fed., 143, were based upon doctrines that have since been abandoned and that the combination in question violated the law and particularly the statute of the State which forbade combinations which "intended to hinder competition."

In the case of Olive v. Van Patten, 25 S. W., 428 (Texas), the defendant association was composed of wholesale lumber dealers who agreed together to sell only dealers and not consumers, and because the plaintiff, who was a manufacturer, refused to join their association and sold directly to consumers, they issued circulars requesting that patronage be withdrawn from him. The object was merely to protect themselves against plain-

tiff's competition, which infringed upon the sphere of the wholesaler, but the Court held that such object did not remove the taint of malice.

> "It cannot be held that defendants had the right to prevent plaintiffs from selling to consumers, or that such interference by them (defendants) was serving a legitimate purpose connected with their own business. To break plaintiffs down as competitors for the consumers' trade might, it is true, result in benefit to defendants; but such a benefit, obtained in such a manner, could not be deemed a legitimate purpose within the meaning of the opinion quoted (Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St., 173). Plaintiffs had the right to sell at wholesale or retail, or both, to the retail dealer and the actual consumer; and defendants had the same right, as well as the right to solicit and secure trade from plaintiffs' customers by underselling them. This would be legitimate. They could do this and would not be responsible for the injurious consequences to plaintiffs' business; but they could not without some legal purpose directly serving their own business, maliciously induce third persons not to trade with plaintiffs, and so injure them."

The case of Klingel's Pharmacy v. Sharpe & Dohme, 104 Md., 218, 7 L. R. A. (N. S.), 976, involved a combination of druggists to maintain prices and drive out all competitors who refused to join the association by refusing to sell them and refusing to sell any one who did sell them. The sole motive was the desire to protect the conspirators against the injurious competition of the plaintiff, but the Court held that all combinations to suppress competition were illegal under the common law.

In the case of Knight & Jillson Co. v. Miller, 87

N. E., 823 (Ind.), the defendants combined to prevent competition in the plumbing business and to refuse to sell to all who did not become members. Plaintiff sought a mandatory injunction under the State Anti-Trust Act, compelling defendants to sell him.

> "They are each and all things which tend to stifle and restrain competition as a matter of law. At common law it was both indictable and the individual affected had a right of private action."

The case of McIlhany v. Chicago Live Stock Exchange, 170 Ill., 556; 39 L. R. A., 373, arose on a proceeding to oust the defendant corporation from its franchises because it was an unlawful combination in restraint of trade. The Court held:

> "Combination and associations of men have no right to place restrictions upon the right of an individual to contract and engage in business employing such means and agencies as are not prohibited by law. The natural flow of trade and commerce must be restricted and men engaged therein may accelerate its current by all means not unlawful. To this end men engaged in trade and commerce may advertise, employ men to solicit business and offer rewards and inducements to secure trade without violating the law of the land and so doing are exercising a right which is in the interest of the public because competition cannot be hostile to public interest. Efforts to prevent competition and to restrict individual efforts and freedom of action in trade and commerce are restrictions hostile to the public welfare not commensurate with the spirit of our public institutions, and in violation of law. * * * But by-laws must be reasonable and for a corporate purpose and always within charter limits. They must always be strictly subor-

dinate to the constitution and general law of the land. They must not infringe the policy of the State, nor be hostile to public welfare. Attempts to place restrictions on trade and commerce and to fetter individual liberty of action by preventing competition, are hostile to public welfare and the interests of the people."

"The authorities affirm as a general rule, that if the act complained of by its results will restrict or stifle competition the law will regard such act as incompatible with public policy without any proof of evil intent on the part of the actor or actual injury to the public." (Citing cases.)

See, also,

State v. Standard Oil Co., 116 S. W., 1009 (Mo.).

In the case of State v. Aikens, 112 Pac., 605 (Kan.), there was an arrangement whereby the members of a live stock exchange agreed to deal only with commission men who confined their dealings to the exchange. The Court held the agreement to be illegal, and said:

"It is said that the members compete among themselves in the purchase and sale of cattle. True; but they stifle all other competition as far as they can. It is said that they trade with none but outsiders. But how? Through commission men who must confine their dealings to the members of the exchange or be boycotted out of business. The right of an individual to trade or refuse to trade with whomsoever he pleases and the right of the members of this exchange to associate themselves in good faith for the purpose stated in the preamble of their by-laws, are not involved in this case or in any way infringed by the judgment. It is a vicious combination, conspiracy and trust to monopolize

> trade, restrict the pursuit of business and prevent competition which the state has charged and proved and which the statutes and the judgment condemn."

The case of Star Mill &c. Co. v. Forth Worth &c. Co., 146 S. W., 604 (Texas), was also a combination to avoid the competition of curbstone brokers or illegitimate dealers who carried no stock. The plaintiff, in order to purchase grain, was obliged to agree that he would only deal with "legitimate dealers," and the Court held that such agreement was void under the Anti-Trust statute.

In the case of Reeves v. Decorah Farmers' Society, 140 N. W., 844, a third party who was a dealer in hogs was granted an injunction restraining the defendant society from carrying out an agreement whereby the farmers, who were members of the defendant society, agreed to sell all of their hogs to the society, or, if the members sold to outsiders, a certain percentage on the sale had to be paid to the society.

In the case of Arnold Co. v. Jones Co., 152 Ala., 501, 12 L. R. A. (N. S.), 150, the Court said:

> "Nearly all of the decisions on the subject of preventing and stifling competition involved combinations among those having commodities for sale to hold up the prices, but the principle is the same whether the combination be upon the part of the sellers or of the purchasers. He who has commodities to sell on the market has the same right to competition among buyers as the purchaser has to competition among sellers."

In the case of Anderson v. Jett, 89 Ky., 375; 6 L. R. A., 390, the Court said:

"The combination or agreement, whether or not in the particular instance it has the desired effect, is void. The vice is in the combination or agreement. The practical effect of the combination only demonstrates the practice, but if the object is to prevent or meet free and fair competition in trade and may in fact have that tendency, it is void as being against public policy."

POINT X.

The facts establish a combination to cause strikes against customers of complainants for the purpose of preventing the sale of their products as long as they operate an open shop, and is, in effect, a secondary boycott of the complainants, which is unlawful.

Attempts are being made to compel third parties to discontinue their dealings with the plaintiff by strikes and threats of thereof, which is the essence of a secondary boycott.

"The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes and there is no doubt that (to quote from the well-known work of Chief Justice Erle on Trade Unions) 'that at common law every person has individually and the public also has collectively a right to require that the course of trade should be kept free from unreasonable obstruction.'"

Loewe v. Lawlor, 208 U. S., 283.

The primary objection of the plaintiffs to the

combination set forth in this case is, that third and neutral parties who are their customers or possible customers are threatened with such dire consequences if they deal with plaintiffs, that they are deprived of their freedom of choice, and do not dare to deal with the plaintiffs. In this way the market, which should be open to the plaintiffs and all other manufacturers producing merchandise which it is the desire of citizens of this State to purchase, is closed. It is immaterial whether the threat against the customer is that of a strike or boycott. In the one case, the unions threaten withdrawal of patronage; in the other case, they threaten a strike. Both acts are equally damaging, and both threats are equally coercive.

In view of the many cases condemning secondary boycotts, and the great uniformity of opinion relating thereto, we limit ourselves primarily to decisions where the boycott is being conducted through threats of calling a strike or creating labor difficulties of a similar kind. In the following cases against the same United Brotherhood of Carpenters, the identical combination as is herein set forth has been stamped as illegal:

Purvis v. Local, 500, 214 Pa. State, 348 (63 Atl., 585.);
Shine v. Fox Bros. Mfg. Co., 156 Fed., 357 (C. C. A.);
Huttig Sash & Door Co. v. Fuelle, 143 Fed., 363;
Lohse Patent Door Co. v. Fuelle, 114 S. W., 1001 (Mo.);
Booth v. Burgess, 65 Atl. Rep., 226 (N. J.);
Irving v. Joint District Council, 180 Fed., 896;

Newton v. Erickson, 126 Supp., 949, Affd. 129 Supp. (N. Y.), 1111; 150 Supp., 1073 (App. Div.);
People v. McFarlin, 89 Supp., 527;
Paine v. Neal, 212 Fed., 259 (case at bar);
Irving v. Neal, 209 Fed., 471;
Bossert v. Dhuy, App. Div.

Of a similar nature is the case of Purington v. Hinchliff, 219 Ill., 159, which concerned the bricklayers' union, and the case of Piano Workers v. Piano Co., 124 Ill., App. 35, and the case of People v. Davis, 159 App. Div., 464 (N. Y.).

In the case of Burnham v. Dowd, 217 Mass., 351; 104 N. E., 841, a builder by the name of Gauthier employed non-union masons in construction work, and the building trades' council "voted to refuse to handle any building material of any firm that furnished stock to Gauthier or to any unfair contractor." The plaintiff subsequently was declared unfair for continuing business with Gauthier. The Court found that the injury to the plaintiff was illegal, although it resulted from the normal working out of union agreements and policies.

> "It is a part of their principles, which all the members of the union are under obligation to respect and uphold, that all men of their craft or trade working in Holyoke or its immediate vicinity, that is, within the jurisdiction of their union, must be members thereof; that all their members should refuse to work with men of their craft who were not members of the union or had not declared their intention to join it; should refuse to work for employers who were declared unfair by the union; and should refuse to use in their work any materials that had been sold

> or furnished by any merchant who was declared unfair by the union. * * * The defendants did not act from actual personal malice toward the plaintiffs, but their acts were done in pursuance of their union principles and purposes, as above stated, and without caring for the injurious consequences to the plaintiffs."

Each of the cases against the carpenters involved a trade war for the benefit of the defendants, as in the case at bar, and in none of them was there any claim of express malice.

In the case of Irving Neal (*supra*), a preliminary injunction was issued by United States Circuit Court Judge Ward, in August, 1910, of the same general character as herein prayed for, and in 1911 Judge Coxe of the same court issued an injunction of the same wording in the case of Paine v. Neal (*supra*). A significant extract from this injunction is as follows:

> "From attempting to prevent the use, installation or sale of complainants' products by inducing or attempting to induce any person or persons whomsoever to decline employment or cease employment or not to seek employment under any person, firm or corporation because such persons, firm or corporation may have made contracts or purposed to make contracts with complaints or may have purchased or purposed to purchase materials from the complainants."

An examination of the case of Shine v. Fox Bros. (*supra*), decided by the Circuit Court of Appeals in an opinion rendered by Circuit Judge Hook, will show that the facts in almost every detail correspond to the case at bar and that the case

grew out of the general attempt to unionize all of the shops in St. Louis rather than any attempt to injure a particular party. The Court said:

> "Although action was taken against some of the other open shop factories, it is quite clear from the evidence that complainant was selected for especial attention. There seemed to be in this case more persistent and concentrated efforts. The defendants did not go about it by approaching complainant's employees and persuading them to join the union labor organizations, but they endeavored to make it impossible for complainant to continue its business unless it would adjust the wages and hours of labor to the union scale and require its employees to join the unions or leave its service. Their efforts were not solicited by those employed, nor did the complainant invite their intervention. * * * They caused to be printed circulars giving lists of factories which are run as closed shops and delivered them to builders and achitects of St. Louis. * * * The circulars contained a warning that union carpenters would not be permitted to work upon any building materials not the product of a closed shop. They kept track of the output of complainant's factory and where it was delivered for use in building. Some contractors who had been customers of complainant for many years were required to sign a contract which put an end to this patronage. Building operations in which the product was used were suspended by strikes of union workmen, which were ordered by the defendants. In some instances the union carpenters did not desire to cease work, but they were required to do so by threats of discipline at the hands of the organization, which meant fines and ultimate expulsion. * * * In most instances where obligations had been incurred by builders requiring them to use the

> products of the complainant's factory, they were allowed to continue with union labor upon the condition that a contract be executed wherein the builder agreed that in the future he would not use such material."

In the case of Purvis v. Local No. 500, 65 Atl., 585 (Pa.), this same United Brotherhood was brought to the bar of justice on account of the same combination in 1906, and the highest court in Pennsylvania held that such combination was illegal. The Court's attention is invited to the form of injunction granted in that case, which is set forth in the reported opinion and covers all of the acts of which we complain. In that case, it appeared that the only force operating against the complainant was the rule which forbade the union men from working on non-union millwork.

> "When the District Council, with its 7,000 members in the Pittsburgh district, gave notice to practically all of the building contractors in that district that the plaintiffs refused to run their mill in accordance with union rules, and calling attention to the working rule which forbids union workmen to work on material from any non-union mill, the contractors understood what the request not to patronize plaintiff's mill meant."

In that case, too, the defendants made the contention that they were not maliciously actuated by any desire to injure the plaintiff, but were seeking their own benefit.

> "True, the defendants contend and testify that their purpose was to benefit their own members. This doubtless in a sense is true, but the benefits sought were the remote purpose which was to be secured through the more immediate purpose of coercing the plaintiffs into complying with their demands or otherwise injuring them in their business,

and the Court cannot in this proceeding look beyond the immediate injury to the remote result."

In the case of Huttig Sash & Door Co. v. Fuelle, 143 Fed., 363, the United Brotherhood was enjoined because the plaintiff was injured by a general combination to unionize the mills of St. Louis. An examination of the form of notices sent to builders and architects, as appearing on pages 369, 370 of the opinion, will show the Court that the combination was one to prevent the use of all non-union material for the benefit of the defendant union, and that the attack on the plaintiff was but one step in this general movement. The agreement which the builders were obliged to sign did not contain provisions forbidding them to use the material of the plaintiff, but were like the agreements of the master carpenters in New York providing that no non-union material should be used.

The facts in the case of Newton v. Erickson (*supra*) will be found to be almost identical with the facts in this case. They are stated by Judge Blackmar in his opinion as follows:

"The plaintiff is a manufacturer of doors, sashes, blinds and trim. It does a business of $300,000 a year and employs about 175 men. It keeps an 'open' shop, employing men without reference to their membership in labor unions. The defendants are agents and officers of certain local labor organizations affiliated with and subordinate to the United Brotherhood of Carpenters & Joiners of America, being a union of about 185,000 workers in wood. The defendants and those whom they represent are hereinafter called the 'Union.' The union has established a certain scale of wages and hours of labor for

woodworkers, and in all mills engaged in business competing with plaintiffs in which union labor is employed this scale of wages and hours of work perforce obtains. As the plaintiff is an 'open' shop, its scale of wages is less and hours of labor more than in 'union' shops. 'Union' mills are therefore at a disadvantage in competition with the plaintiff; and the union, in its attempt to maintain its scale of wages and hours of labor, necessarily feels the pressure of this competition. The union therefore attempted to 'unionize' the plaintiff's mill. Their ultimate motive was to enable them to impose on plaintiff their scale of wages and hours of service and other conditions, which, in their opinion, were beneficial to labor. With this end in view, the representatives of the union called on plaintiff and requested it to 'unionize' the factory, and discharge all employees who would not join the union. This plaintiff refused to do. The union thereupon set out to compel it to do so. The product of plaintiff's factory is sold mainly to builders in New York. The carpenters employed by said builders are largely union men. The plan of action devised and put in force by the union was to so injure the plaintiff's trade by working upon the fears and necessity of its customers that it would be obliged to submit to the union's demands. For this purpose, it circulated among the owners, contractors and builders of New York a notice to the effect that the union would refuse to handle material unless made under 'strict union conditions.' The circular contained a list of the firms working under agreement with the union, omitting the plaintiff's name. The union then proceeded to call strikes against the builders and contractors who used the plaintiff's material, which were enforced by a system of fines on its members."

A quotation from the decision in the Lohse case

(*supra*), succinctly summarizes the law laid down in each of these cases and is as follows:

> "The petition clearly charges the defendant with being guilty of boycotting plaintiff's business for the reason, as before stated, the petition charges the defendants with having formed a combination to injure plaintiff's business by having caused the builders of the City of St. Louis against their will to withdraw from the plaintiff their beneficial business intercourse through threats that unless a compliance with their demands be made, the defendants would cause a strike to be called against the said business. All the authorities hold that a combination to injure or destroy the trade, business or occupation of another by threatening or producing injury to the trade, business or occupation of those who have business relations with him is an unlawful conspiracy, regardless of the name by which it is known, and may be restrained by injunction."

Aside from the cases against these defendants, one of the most important cases decided in the United States was one in which our former president, Mr. Taft, rendered the opinion as United States Circuit Judge of Ohio, and which involved the violation of an injunction which enjoined the American Railway Union from combining together to refuse to handle the cars of the Pullman Company, and directing and continuing a strike for that purpose until the Pullman Company should grant the demands of its employees. In considering the fundamental principles involved, Judge Taft very aptly said:

> "It was a boycott. The employees of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render their service any more burdensome. They had no complaints against the use of Pullman cars as cars.

They came into no natural relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours, or in any way determine their services. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service. This inflicted an injury on the companies that was very great, and it was unlawful, because it was without lawful excuse. All the employees had the right to quit their employment, but they had no right to combine to quit in order thereby to compel their employers to withdraw from a mutually profitable relation with a third person for the purpose of injuring that third person, when the relation thus sought to be broken has no effect whatever on the character or reward of their service. It is the motive for quitting, and the end sought thereby that makes the injury inflicted unlawful and, the combination by which it is effected, an unlawful conspiracy. The distinction between an ordinary lawful and peaceful strike, entered upon to obtain concessions in the terms of the strikers' employment, and a boycott, is not a fanciful one, or one which needs the power of fine distinction to determine which is which. Every laboring man recognizes the one or the other as quickly as the lawyer or the judge. The combination under discussion was a boycott."

Thomas v. Cincinnati R. Co., 62 Fed., 818.

Toledo R. R. Co. & N. M. Ry. Co. v. Penn., 54 Fed., 730.

An injunction of this kind issued by Judge Taft has also been enforced by this Court in contempt proceedings *in re* Lennon, 166 U. S., 548.

In the case of Moores v. Bricklayers' Union, 23

Law. Bul., 665 (Aff'd by Ohio Sup. Ct.), Judge Taft clearly laid down a similar doctrine as follows:

> "Again, if a workman is called upon to work with the material of a certain dealer and it is of such a character as either to make his labor greater than that sold by another or is hurtful to the person using it, or for any other reason is not satisfactory to the workman, he may lawfully notify his employers of his objection and refuse to work."

He then went on to show that the combination involved was of an entirely different character, and that the men had no right to strike for the purpose of arbitrarily refusing to work upon material which did not make their labor more onerous.

In the famous case of Quinn v. Leathem, 1901 App. cases, 495, which is one of the leading cases on trade disputes, it appeared that a customer was told that if he continued to deal with plaintiffs his employees would be induced to leave him. Lord Lindley said:

> "The defendants were doing a great deal more than exercising their own rights. They were dictating to the plaintiff and his customers and servants what they were to do. Defendants were violating their duty to the plaintiff and his customers and servants, which was to leave them in the undisturbed enjoyment of their liberty of action as already explained."

The combination is also illegal because the strikers are not seeking direct benefits for themselves in their employment on the buildings, but are in reality engaged in a sympathetic strike to control other people's condition of employment.

Any decisions cited by the defendants tending to support contrary principles will be found to rest upon two contentions which have been declared erroneous by the United States Supreme Court, as follows:

(a) The doctrine that what one man may lawfully do, any number may do in concert, has been repudiated.

Granada Lumber Co. v. Miss., 217 U. S., 433.
Eastern States Retail Dealers Ass'n v. U. S., 234 U. S., 600.
Drew v. Thaw, 235 U. S., 432.

(b) The doctrine that an act otherwise lawful does not become unlawful when done without justification or for the malicious purpose of injuring another, has been repudiated.

Aikens v. Wisconsin, 195 U. S., 204.

These two repudiated doctrines lie at the foundation of the case of National Protective Assn. v. Cummings, 170 N. Y., 315.

The iniquity of this secondary boycott, carried on by sympathetic strikes, is further emphasized by the fact that those who engage in it did not do so voluntarily, but were coerced so to do under a penalty of fine. The use of fines for the purpose of carrying out a combination of this kind constitutes intimidation and is unlawful. The action of the master carpenters in boycotting non-union material is also secured by fines and penalties.

> "Without undertaking to designate with precision the lawful limit of organized effort, it may safely be affirmed that when the will of the majority of an organized body in matters involving the rights of outside parties is

enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation."

Boutwell v. Marr, 71 Vt., 1.
Martell v. White, 185 Mass., 255.

In the cases of Booth v. Burgress, *supra,* and Purvis v. Local Union (*supra*), fines for identically the same purposes as the fines described in this case were declared to be unlawful and enjoined.

Whatever law there is in the State of New York upon the subject of secondary boycotts, condemns them. In the case of Matthews v. Shankland, 56 Supp., 127, it appeared that the "Buffalo Express" was being injured by the Typographical Union because of the loss of advertisements, due to threats directed against the advertisers to the effect that if they advertised in that paper labor unions would withdraw patronage from them. In condemning this combination, the Court said:

> "It is not denied that the purpose of these attacks was to boycott the "Express," to lessen its circulation, to reduce its advertising patronage and, in the consummation of these objects, it is quite apparent the defendants in their zeal have overstepped the bounds of prudence and of law and gone beyond mere persuasion, mere moral force, and have threatened, intimidated and frightened patrons of the "Express" into ceasing to give it patronage or support."

In the case of Beattie v. Callanan, 87 Supp., 415, finally decided by the First Department after the decision in the Cummings case, the question was whether or not the defendants had a right "to maliciously cause parties who had entered into

contracts with them to deliberately break them by means of threats to cause or actually causing a strike of all the workmen in the employ of said parties." The Court, in passing upon this question, said:

> "The methods here employed to compel the plaintiff to accede to the demands of the defendants are unjust, unreasonable and such as the law does not recognize and will not tolerate. As well might the defendants resort to physical force to enforce the alleged rights or redress real or imaginary wrongs."
>
> Beattie v. Callanan (*supra*).

> "Conceding that the employees of the plaintiffs and the employees of the other manufacturers have the right to strike, whatever their motive, has the defendant union the right to call a strike in the shops of other employers of labor for no other reason than because they deal with plaintiffs?" • • • For officers of a union not employees of a manufacturer to say to that manufacturer, who has complied with all the demands of the union, 'If you sell any goods to such a person we will call a strike in your factory' is an unlawful interference with the right of the person so boycotted and the person so boycotted may have an injunction against any persons who, by means of such threats, interfere with his rights to buy goods where he desires. Such threat, to use the language of the Court in Curran v. Galen, militates against the spirit of our government and the nature of our institutions."
>
> Schlang v. Ladies' Waist Workers, 124 Supp., 289.

The attempt to discriminate against non-union trim is arbitrary and unreasonable and is assertive of a right which could not be exercised by the State itself. This has been decided.

"The appellants say that it does not conflict with the rule of equality; that it puts into one class all who deal in convict-made goods and treats them all alike; and that is a reasonable classification. Let us see. That classification is based upon the origin of the goods dealt in, without regard to the quality or character or nature of the goods themselves. Clothing, household furniture, shoes, scrubbing brushes, brooms, harness, anything that can be made by hand or machinery, falls within one classification, provided the origin is the same. Substitute a state for a prison, and no one would be willing to say that a law which required all persons who might deal in goods, wares and merchandise made in New Jersey would be valid; or, if it be objected that that would be a direct violation of the Federal Constitution, made in Troy, or in Schenectady, or in Buffalo. Take another classification, that a license fee should be required for dealers in all goods made by machinery, or all goods made by hand. If such classification be valid, and if the purpose of the act, as is claimed, is to protect free labor from prison labor, why in these days of contest between organized and unorganized labor should not an act be passed which provided for such a license for selling all goods made in a shop which did not employ union labor, and then, if the advocates of a free shop were in power, repeal it, and provide for such license for all goods made in shops which employed union labor, or single out for license dealers in goods made in shops employing members of certain races, religions, or political parties. All these classifications would be based on origin, as is that under consideration."

People v. Raynes, 120 Supp., 1057;
Affd. 198 N. Y., 539.
People v. Hawkins, 157 N. Y., 1.

POINT XI.

The combination of defendants to bring about the employment of members of their organization exclusively in their industry throughout an entire community is unlawful.

One object of this combination is to secure the exclusive employment of members of the Brotherhood at the work of manufacturing and erecting wood materials for buildings, throughout the entire country, by preventing Brotherhood members working where any non-member is employed or where any materials are used which come from any employer who employs any non-union carpenters. The National Constitution of the Brotherhood, which is binding on all local unions and district councils, directs its 1900 local unions and numerous district councils to prevent its members working on non-union material wherever possible and the By-Laws of the New York District Council provide for $10 fine for any member who works with non-union men or on open shop material. There is an open organized warfare on the part of 200,000 carpenters to drive all non-union men from the trade by striking against all employers who employ non-union men and striking against the use of any material supplied by any employer who employs non-union men, and large sums of money have been spent for this purpose. The system constitutes a series of coercive steps to exclude all non-members from the trade.

Step I. Some employees of the complainants do not join the union, either because they do not wish to join, or because no local union will give them

the necessary two-thirds' vote to make them members. The complainants are willing they should join.

Step II. The complainants are told that unless they discharge and refuse to employ their non-union mill men, their products will be boycotted by strikes on buildings where their materials are used and the metropolitan markets will be closed to them. They still refuse to comply.

Step III. The customers of the complainants are asked to stop dealing with them until such time as they will close their doors to all non-union men, and they refuse.

Step IV. Strikes are called against every one of the customers or would-be customers of these complainants until such time as they shall cease dealings with these complainants, as long as they harbor non-union men.

Step V. Customers of the complainants are coerced by strikes on buildings into signing contracts precluding the use of materials from complainants or any "open shop."

Step VI. The union men who are unwilling to strike against complainants' customers in order to compel them to stop dealing with complainants while they employ non-union carpenters are threatened with fines if they do not do so.

Step VII. If non-union carpenters are employed to do the work which union carpenters are prevented from doing, all other trades on the building are called out on strike.

All of these steps are backed by the moral force and resources of 200,000 men, and none of the parties are acting voluntarily, except the salaried

officers. It is no local combination of New York which we attack, but a national combination of 200,000 men to control the trade throughout the United States.

Unlike most adjudicated cases involving organized labor, this case does not involve any attempt to further a labor dispute between the complainants and their employees. It is not contended that the employees of the complainants are discontented or have any grievances or that the defendants are acting in their behalf. The object is to disrupt mutually satisfactory relations between these employers and their employees by compelling the employer to discharge all who do not or cannot join the union.

This case resolves itself into questions which startle the imagination: Can the independent working people of the country be driven from their trade by a combination which deprives an employer of a market for his products if he employs them? Can the employers of the country be compelled to discriminate against the non-union workmen of the country, and to enter into a closed shop agreement in order to avoid a secondary boycott of their products, which boycott is enforced by a ten-dollar fine against all workingmen who fail to observe it? Can the unions of the numerous trades which take part in the construction of buildings forbid their members working, under penalty of a fine, on any building where materials are used which in some stages of their production or manufacture were associated with an open shop? Can the carpentry trade combine with thirty other building trades to prevent the employment of non-union carpenters to handle the non-union materials which they prevent their members handling? The consummation of such

a scheme would compel the mines which produce, the smelters which refine, the foundry which molds, and the factory which assembles and polishes, to reject all non-union men before the finished product could be affixed as a lock or a knob to the door of one of our marvellous office buildings. The same would be true of the lumber from the forest, the stone from the quarries, the glass of the windows and the bricks of the walls. All merchandise would be proscribed which had been tainted by the touch of the persecuted non-union man.

The scheme is irresistible if the Court can afford no relief, and its consummation is already threatened by the fettered and shackled conditions of our metropolitan building trades to-day. If we yield to such despotic and monopolistic control of industry by an organization of 200,000 men, operated from a point nearly a thousand miles away from this city, and out of sympathy with our local conditions, individual liberty is annihilated, and the non-union man is abandoned.

With the success of this combination, membership in a private society, over which the Court exercises no control, becomes synonymous with the right to pursue the carpentry trade, for no man will be employed without the union license. The union at the same time determines the issuance of such license by the two-third vote of one of the local unions and allows an unfavorable vote to follow the man throughout the United States to whatever local he may make future application.

It is no defense to say a man may become a member where there exists the power to arbitrarily reject him.

Montague v. Lowry, 193 U. S., 38.

The illegality of such operations has been passed upon by this Court in a criminal proceeding where certain members of the Musicians' Union were indicted and tried for similar conduct without a jury trial. *Habeas corpus* proceedings were commenced, and the question at issue was, whether the offense was a petty one or a serious one entitling the parties to a jury trial. The information charged that the defendants conspired to prevent certain parties from pursuing their trade or calling by refusing

> "to work as musicians, or in any other capacity, with or for the persons first above named, or with or for any person, firm or corporation working with or employing them; to request and procure all other members of said organizations, and all other workmen and tradesmen, not to work as musicians, or in any capacity, with or for them, or either of them; or for any persons, firm or corporation that employed or worked with them or either of them, and to warn and threaten every person, firm or corporation that employed or worked with them or either of them, and to warn and threaten every person, firm or corporation that employed or proposed to employ the said persons, or either of them, and that if they did not forthwith cease to so employ them and refuse to employ them, and each of them, such person, firm or corporation so warned and threatened, would be deprived of any custom or patronage, as well from the persons so combining and conspiring as from all other members of said organization in and out of the district."

The Court held:

> "It is an offense of a grave character affecting the public at large, and we are unable to hold that a person charged with having

committed it in this district is not entitled to a jury when put upon his trial."

Callan v. Wilson, 127 U. S., 540; 32 L. Ed., 223, cited in Granada Lumber Co. v. Mississippi U. S., Supreme Court; 217 U. S., 443.

This is a foundation case in this country, and a clear declaration that any combination to prevent a person from pursuing his trade or calling is a serious offense and a criminal conspiracy.

The principles underlying this case are similar to the case at bar, inasmuch as it is a combination to prevent the plaintiffs giving employment to non-union workmen and, by a secondary boycott, to prevent their doing business if they do so.

The case of Gompers v. Bucks Stove & Range Co., 221 U. S., 418, upholds the right to form labor unions and says:

"But the very fact that it is lawful to form these bodies with multitudes of members means that they have thereby acquired a vast power in the presence of which the individual may be helpless. This power when unlawfully used against one cannot be met except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution, or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made it is the duty of government to protect the one against the many as well as the many against the one."

The legality of the closed shop agreement has been a vexed question, but it has been decided by this Court that such an agreement, unless involving interference with third persons or the general public, or the question of monopoly, is not illegal.

In the case of Coppage v. Kansas, 236 U. S., , this Court had before it the constitutionality of the law forbidding employers to require that employees sign an agreement not to join a union as a condition of employment. In condemning the law as unconstitutional, Chief Justice Pitney said:

> "Can it be doubted that a labor organization—a voluntary association of workingmen —has the inherent and constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with non-union men? Or that a union man has the constitutional right to decline proffered employment unless the employer will agree not to employ any non-union man? (In all cases we refer, of course, to agreements made voluntarily and without coercion or duress as between the parties. And we have no reference to questions of monopoly or interference with the rights of third parties or the general public. These involve other considerations respecting which we intend to intimate no opinion)."

The same doctrine has been laid down by other courts in a considerable number of cases. In the case of Burnham v. Dowd, 217 Mass., 35; 104 N. E., 841, the Court said:

> "They have a right to say that they will do no work for him unless he will give to them all the work of their trade, that they will do all or none of his work. * * * If he employed also non-union men of their craft, they would have a right, unless they were bound by some term of their contract of employment, to strike, unless all of this work should be given to them or to their associates."

See, also,

New England Cement Co. v. McGivern, 105 N. E., 885;
Pickett v. Walsh, 192 Mass., 572; 78 N. E., 753;
Hoban v. Dempsey, 104 N. E., 717;
Fairbanks v. McDonald, 106 N. E., 1000;
National Fire Proofing Co. v. Mason Builders, 169 Fed., 259.

But if the agreements are entered into for the purpose of injuring a third party, or a strike is entered upon for the purpose of procuring the discharge of a member because he does not belong to the union, then the combination or agreement is illegal and the injured party has a cause of action.

Folsom v. Lewis, 208 Mass., 336;
Berry v. Donovan, 188 Mass., 363;
Fairbanks v. McDonald (*supra*);
Aberthaw Construction Co. v. Cameron, Mass., ; 80 N. E., 478.

In the case of Folsom v. Lewis (*supra*), the Court rendered a unanimous opinion containing the following:

> "The master was undoubtedly right in finding that the purpose of the defendants and the real object of the strike was not so much to obtain slight advantages referred to in the proposed agreement as to compel the employers, by inflicting this injury against them, to submit to an attempt to obtain for the union a complete monopoly of the labor market in this kind of business, by forcing all laborers who wish to work to join the union and by forcing all employers to agree not to employ laborers except upon such

> terms as they could make with the combination that should control all labor in this business. This has been held to go beyond the limit of justifiable competition. Conduct directly affecting an employer to his detriment by interference with his business is not justifiable in law unless it is of a kind and for a purpose that has a direct relation to benefits that the laborers are seeking to obtain. Strengthening the forces of a labor union to put it in a better position to make its claim in controversies that may arise with employers, is not enough to justify an attack upon the business of an employer by inducing his employees to strike."

Even though the closed shop agreements are not entered into the purpose of injuring or interfering with the employment of a non-union man, or procuring his discharge, they nevertheless are illegal when they become so widespread as to unduly restrict the freedom of the individual to pursue his calling, because they then offend the law against monopolies. This doctrine has been squarely laid down in New York State and Connecticut and has been suggested in other cases.

The decisions of the State of New York upon this question support our position. The first case which concerned the question of the closed shop was the case of Curran v. Galen, 152 N. Y., 33, where the question involved was the legality of an agreement to employ union men only.

In that case the Court said:

> "Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper or to restrict that freedom and, through contracts or arrangements with employers, to coerce other work-

> ingmen to become members of the organization and to come under its rules and conditions under the penalty of the loss of their positions and of deprivation of employment, then that purpose seems clearly unlawful and militates against the spirit of our government and the nature of our institutions."

In all the large number of labor cases that have been decided by the different State and Federal courts of this country, none have ever more forcibly, clearly and aptly expressed the gravity and dangers of the combination herein set forth than does the case of Curran v. Galen, which has never been overruled and was reaffirmed in the case of Jacobs v. Cohen (*infra*). Some claims have been made that the case of National Protective Association v. Cummings, 170 N. Y., 315, in which the opinion was rendered by former Chief Justice Parker, to some extent modified the law as declared in the Curran case; but it must be remembered that the Cummings case was decided by a divided court along certain strict and peculiar lines, and concerned only the refusal of certain union men to work with non-union men. One of the main considerations underlying the decision of that case as expressed in the prevailing opinion was the fact that workingmen should have a right to say with what employees they would work in order to protect themselves against injury, for which no relief would lie under fellow-servants' doctrine. The case at bar does not only involve refusal of union men to work with certain non-union men, but also a boycott upon the products of non-union men, in order to control the conditions of employment between parties doing different work in a different place. But the illegality of a combination to establish the closed shop and prevent the employment of non-union men, has

been further defined by subsequent decisions in this State. In the case of Jacobs v. Cohen, 183 N. Y., 207, the Court of Appeals sustained an agreement on the part of an employer to employ only union men, but this was an instance where a party to the agreement was moving for its enforcement, and it did not appear any third party had been injured thereby. It concerned, moreover, the affairs of only one employer, and the agreement was voluntary. In sustaining this agreement by a divided court the prevailing opinion showed that the Court would not sustain a similar agreement involving many employers and many employees throughout the community. In this connection the Court said:

> "These restrictions were not of an oppressive nature operating generally in the community to prevent such craftsmen from obtaining employment and from earning their livelihood."

This distinction is conspicuously applicable to the case at bar, for, as already shown, the combination which injures the plaintiffs was a combination to compel all employers throughout the country to discharge all carpenters who would not join and pay tribute to the Carpenters' Union. It is a general attack on the non-union world to drive it from the trade of making or erecting wood materials. Referring to the decision of Jacobs v. Cohen on this point, the Appellate Division rendered a decision in a subsequent case which was later unanimously affirmed by the Court of Appeals, in which it said:

> "In the latter case Judge Gray, writing for the Court, makes it quite clear that while an individual employer may lawfully agree with a labor union to employ only its mem-

bers because such an agreement is not of an oppressive nature operating generally throughout the community to prevent craftsmen in the trade from obtaining employment and earning their livelihood, yet that such an agreement, when participated in by all or by a large portion of employees in any community, becomes oppressive and contrary to public policy because it operates generally upon the craftsmen in the trade and imposes upon them as a penalty for refusing to join the favored union, the practical impossibility of obtaining employment at their trade and thereby gaining a livelihood."

McCord v. Thompson-Starrett Co., 113 Supp., 385; Affd. 198 N. Y., 587.

If it is true that an agreement to employ only union men operating generally throughout a community is illegal as against public policy, it necessarily follows that any acts done in furtherance of a combination to compel a group of employers to enter into such an illegal agreement against their will bears a double taint of illegality. This was the basis of Judge Goff's decision in the case of Schwarcz v. International Ladies' Garment Workers, 124 Supp., 968, where he held that, inasmuch as the strike, which otherwise might be legal, had for its object the enforcement of the closed shop against a group of employers, such strike became illegal, and all picketing in furtherance thereof was equally illegal. The same ruling was made in the case of Schlang v. Ladies' Waist Workers, 124 Supp., 289.

The recent unanimous decision of the highest court of Connecticut in the case of Connors v. Connolly, 86 Conn., 641, 86 Atl., 600, is also in point. The plaintiff, who was a union workman

working in a closed shop, sued for damages because his discharge was procured by the defendant union when his union membership ceased for non-payment of dues. There was no malice against him, and the point decided was that closed shop agreements between the union and any considerable number of employers in any community were against public policy because monopolistic and unduly restricting the right of workmen to follow their trade. The Court said:

> "Where the agreement is one which takes in an entire industry of any considerable proportion in a community, so that it operates generally in that community to prevent or to seriously deter craftsmen from working at their craft or workingmen obtaining employment under favorable conditions without joining a union, it is contrary to public policy (Jacobs v. Cohen, 183 N. Y., 207, 211; Berry v. Donovan, 188 Mass., 353; Barnes v. Berry, 156 Fed., 72, 77; Del. & L. R. R. Co. v. Switchmen's Union, 158 Fed., 541, 545).
>
> "The reasons for this conclusion are as evident as they are conclusive. 'There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor' (Slaughterhouse Cases, 83 U. S., 36, 106). 'The common law has long recognized, as part of the boasted liberty of citizens, the right of every man to freely engage in such lawful business or occupation as he himself may choose, free from hindrance or obstruction by his fellow men, saving such as may result from the exercise of equal or superior rights on their part' (Brennan v. United Hatters, 73 N. J. L., 729, 742).
>
> "It needs no argument to demonstrate that any combination between employers and employed, which creates a condition in a community, such as has been hereinbefore de-

scribed, is a serious menace to the craftsman or workingman, who, in the exercise of his free right of choice, does not wish to join a union. It is calculated to place upon his freedom of choice and action a coercion which leaves him no longer wholly free. Its tendency is to expose him to the tyranny of the will of others, and to bring about a monopoly which will exclude what he has to dispose of and other people need from the open market, or perhaps from any market (Berry v. Donovan, 188 Mass., 359; Curran v. Galen, 152 N. Y., 33, 37).

"Monopolies of things of common use and need, whether created by governmental grant or by the acts of private persons or corporations, are odious and their existence is contrary to public policy. They were condemned by the common law of England and, although changing in their more common source, have remained under a like condemnation in that country and this to this day. They are especially intolerable where they concern the basic resource of individual existence, to-wit: the capacity to labor (Case of Monopolies, 11 Coke, 85; Slaughterhouse Cases, 83 U. S., 36, 104; Berry v. Donovan, 188 Mass., 353, 359; People v. Sheldon, 139 N. Y., 251, 265). The whole theory of a free government is opposed to them (Norwich Gas Light Co. v. Norwich City Gas Co. 25 Conn., 19, 38). The beneficiaries may enjoy the favors they bestow, and feel injured when deprived of them. But the interests of the public outweigh that of individuals, and the public at large can see nothing but danger in the monopoly of anything of which there is a common need or which is a common resource of life. This is an old and familiar doctrine in whose maintenance none have as deep a concern as the poor, the humble and those who live by the labor of their hands. The monopoly need not be complete to come under the bane of the law. 'It is sufficient if the agreement tends to that end and to deprive the public of the

advantages which flow from free competition' (U. S. v. E. C. Knights Co., 156 U. S., 1, 16").

See, also,

More v. Bennett, 140 Ill., 69.
Brennan v. United Hatters, 65 Atl., 165.

A writer in the "Harvard Law Review" discusses the New York situation as follows:

> "The act of granting or withholding one's goods or labor can be made under circumstances which produce injury to others and deprive the acts of any legal excuse for that injury The worst modern examples of this are the attempts, of which the acts of the defendants in the cases discussed are instances, of associations of capitalists and of associations of labor to close the market to outsiders or the shop to the non-union man or member of a rival union. In all of them the act of the defendant in granting or withholding their goods or labor was an act oppressive to those who would deal with the plaintiff. Its intent was to drive the plaintiff out of the trade or business, which the defendants desired to monopolize for themselves."

The Closed Market and the Union Shop, XXVIII, Harvard Law Review, 444;

See, also,

Employing Printers' Club v. Dr. Blosser, 50 S. E., 353.

In a well-considered Maryland case a non-union man was discharged because the labor unions said they would advertise the house as a non-union one if they retained him. The Court said:

"But when the State granted its generous sanction to the formation of corporations of the character of the appellee, it certainly did not mean that such promotion was to be secured by *making war upon the non-union laboring man* or by any illegal interference with his rights and privileges.

"This was no idle play in which they were involved. It related to the most serious right affecting a laboring man's life, which was the privilege of seeking remunerative employment and thereby gaining an honest livelihood. Is it not unquestionably true that but for the interference of the appellee the appellant would not have been discharged? It is not necessary that such interference should have been malicious in its character, if it be wrongful it is equally to be condemned and just as much in violation of a legal right."

Lucke v. Clothing Cutters, 19 L. R. A., 408.

"Trades unions may cease to work for reasons satisfactory to their members, but if they combine to prevent others from obtaining work by threats of a strike or combine to prevent an employer from employing others, by threats of a strike, they combine to accomplish an unlawful purpose—a purpose as unlawful now as it ever was, though not punishable by indictment. Such combination is a despotic and tyrannical violation of the indefeasible right of labor to acquire property, which courts are bound to restrain. It is utterly subversive of the letter and spirit of the Declaration of Rights. If such combination be in accord with the law of the trades union, then that law and the organic law of the people of a free commonwealth cannot stand together. One or the other must go down."

Erdman v. Mitchell, 207 Pa., 79; 63 L. R. A., 539.

In Casey v. Cincinnati Typographical Union (45 Fed., 135), the Court said:

> "It was an organized conspiracy to force the complainant to yield his right to select his own workmen and submit himself to the control of the union, and allow it to regulate prices for him and to determine whom he should employ and whom discharge. In other words, it was and is an organized effort to force printers to come into the union or be driven from their calling for want of employment and to make the destruction of the complainant's business the penalty for his refusing to surrender to the union."

Referring to an attempt to induce an employer to sign a closed shop contract, the Supreme Court of Illinois said:

> "There can be no doubt that any attempt to coerce the Kellogg Switchboard & Supply Company into signing said agreement by threats to order a strike was unlawful. It was violative of the clear legal rights of the company and was unjust and oppressive as to those who did not belong to the labor organizations."
>
> O'Brien v. People, 75 N. E., 373 (Ill.).

> "Any attempt to compel an individual, firm or corporation to refrain from employing men or to prevent any man or men from working for another is an unlawful interference with a property right."
>
> Sailors' Union v. Hammond Lumber Co., 156 Fed., 450 (C. C. A.).

> "We fully appreciate what is said of the advantages, moral and material, derived from exchanges of the kind in question. When properly conducted, they not only

facilitate business, but tend also to advance the standard of business integrity; still men must be free to go into them or not as they see fit, and they must not block the way of any one to a public market merely because he is not a member of the exchange."

State v. Kansas City Exchange, 109 S. W., 675 (Mo.).

"The right of workingmen to unite for their own protection is undoubted and so is their right to strike peaceably because of grievances; but their right to combine for the purpose of calling out the workmen of other employers who have no grievances, or to threaten owners, builders and architects that their contracts will be held up if they or any of their sub-contractors use the complainants' trim is quite another affair. To take the converse of the proposition: Will the defendants admit that the employers may combine to prevent any employer from using union labor? May the employers agree not to sell to or contract with any one who deals with an employer who uses union labor? Either of these propositions is destructive of the right of free men to labor for or to employ the labor of any one the laborer or the employer wishes (see the language of Justice Harlan in Adair v. U. S., 208 U. S., 161). If the struggle is persisted in between labor and capital to establish a contrary view, ultimately either the workmen or the employers will be reduced to a condition of involuntary servitude."

Irving v. Joint District Council, 180 Fed., 896.

"Under this rule of the common law the right of the laborer to dispose of his skill and industry and to contract in reference to the same with whom he pleases and at such contract rates as might be agreed on was recog-

nized and not allowed to be trammelled with restrictions which interefered with individual action and liberty. Combinations and associations of men have no right to place restrictions upon the right of an individual to contract and engage in business employing such means and agencies as are not prohibited by law—efforts to prevent competition and to restrict individual efforts and freedom of action in trade and commerce are restrictions hostile to the public welfare, not consonant with the spirit of our institutions and in violation of law."

People v. Chicago Live Stock Exch., 170 Ill., 556; 39 L. R. A., 373.

"Persons engaged in any service have the power with which a court of equity will not interfere by injunction, to abandon that service either singly or in a body, if the wages paid or the conditions of employment are not satisfactory, but they have no right to dictate to an employer what kind of implements he shall use or whom he shall employ."

Hopkins v. Oxley Stave Co., 83 Fed., 912 C. C. A.

The law in England is well stated by Pennant in his admirable book on "Trade Unions and the Law." He writes:

"It is now well settled that it is a wrongful act for two or more persons to combine together to induce employers to refuse to continue to employ a workman, even though not bound by contract to do so, and this irrespective of whether for a single individual to do this would be actionable or not, on the ground that a conspiracy to injure resulting in damage is of itself a good cause of action (Quinn v. Leathem, 1901, A. C., 495; Gregory v. Duke of Brunswick, 1845, 6 M. & G., 953; Giblan v. National Labourers' Union, 1903, 2 K. B., 600").

The English case of Allen v. Flood (1898), Cas. 1, to which counsel refer, was restricted and modified by the case of Quinn v. Leathem (1901), App. Cas., 495.

The proper conception of fundamental rights relating to labor controversies has never been better expressed than as follows:

> "Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labor or his own capital, according to his will. It follows that every other person is subject to the correlative duty arising therefrom and is prohibited from any obstruction of the fullest exercise of this right which can be made compatible with the exercise of similar rights by others."
>
> Law Relating to Trades Unions, by Sir William Erle.

The interference with non-union carpenters in the case at bar is not incidental to the exercise of rights by the union carpenters, but is the primary object and purpose of the unions' conduct.

Should this Court desire to examine other decisions bearing upon the question of the illegality of all attempts to bring about the discharge of non-union men, the following will be found to support the doctrine that all such attempts are illegal:

Berry v. Donovan, 188 Mass., 353;
Barnes v. Berry, 156 Fed., 72;
Delaware, L. & W. Co. v. Switchmen, 15 Fed., 541;
Brennan v. United Hatters, 65 Atl. Rep., 165 (N. J.);
Froelich v. Musicians' Association, 93 Mo. App., 390;

Levin v. Cosgrove, 67 Atl., 1070;
Giblan v. National Association, 2 K. B., 606;
O'Brien v. Musical Union, 64 N. J. Eq., 525;
Ruddy v. United Association, 75 Atl., 742 (N. J.);
Jost v. Syndicat Cour d'Appel de Chambery, Mch. 14, 1893, 2, 139;
Reynolds v. Davis, 84 N. E., 457, Mass.;
Wyeman v. Deady, 65 Atl., 129 (Conn.);
Conway v. Wade, 2 Kings Bench (1908), 844; 1909 A. C., 508;
Blanchard v. Newark, 71 Atl., 1131 (N. J.), Aff'd 76 Atl., 1087;
U. S. v. Weber, 114 Fed., 953;
State v. Dyer, 67 Vt., 691;
Carter v. Oster, 112 S. W., 997 (Mo.);
Huskie v. Griffin, 74 Atl., 595 (N. H.);
Moran v. Dunphy, 177 Mass., 485;
American League Club v. Chase, 149 Supp., 6.

It must be recalled, however, that most of the authorities hereinabove cited declare the illegality of a strike to establish a closed shop, and do not involve the aggravated facts in this case, where an effort is being made to boycott employers who employ non-union men, by calling strikes against their customers. The certainty of the illegality of these arrangements lies in the fact that no other explanation can be or has been offered for the refusal of the carpenters to handle open shop trim except the desire to unionize or destroy all open shop factories like the plaintiffs.

The sole end sought by these defendants through their organization of 200,000 and its cooperation with other organizations is the exclusive privilege of pursuing the carpentry trade throughout the United States, and in pursuit of the despotic control of this industry they are now seeking to compel the plaintiffs, under penalty of losing their trade, to refuse employment to any carpenters who do not belong to their organizations. The object of these disturbances in New York and elsewhere is to suppress commerce in open shop articles in order to extend this monopoly to factories a thousand miles away where none of these defendants or any of the outside carpenters who do the striking are, have been, or probably ever will be employed. Such a monopoly is an infringement of the most sacred and fundamental rights of citizenship.

In the Slaughterhouse cases, Mr. Justice Field quotes from Live Stock Assn. v. Crescent City Co., 1 Abb. (U. S.), 398, as follows:

> "It is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, without unreasonable regulation or molestation and without being restricted by any of those unjust, oppressive and odious monopolies or exclusive privileges which have been condemned by all free governments. * * * There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor."
>
> 83 U. S., 36.

> "For the preservation, exercise and enjoyment of these rights, the individual citizen as a necessity must be left free to adopt such

calling, profession or trade as may seem to him most conducive to that end. Without this right he cannot be a free man. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling when chosen is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed" (By Mr. Justice Bradley).

Slaughterhouse Cases, 83 U. S., 36.

"The common business and callings of life, the ordinary trades and pursuits which are innocuous in themselves and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright. * * *

"Monopolies are the bane of our body politic at the present day. In the eager pursuit of gain they are sought in every direction. They exhibit themselves in corners in the stock market and produce market, and in many other ways. If by legislative enactment they can be carried into the common avocations and callings of life so as to cut off the right of the citizen to choose his avocation, the right to earn his bread by the trade which he has learned, and if there is no constitutional means of putting a check to such enormity, I can only say that it is time the Constitution was still further amended."

Butchers' Union v. Crescent City,
111 U. S., 757; 28 L. Ed., 590.

See, also,

Allgeyer v. Louisiana, 165 U. S., 589;
Booth v. Illinois, 184 U. S., 425;
Lottery Cases, 188 U S., 357.

The defendants are seeking to do those things which the Legislature itself is powerless to do. The right of a man to pursue any lawful calling cannot be impaired or restricted except by a justifiable exercise of the police power.

Adair v. U. S., 208 U. S., 161;
Lochner v. New York, 198 U. S., 45;
Holden v. Hardy, 169 U. S., 366;
State v. Haun, 47 L. R. A., 369 (Kan.), cited by U. S. Sup. Ct.

The number of State cases on this point are too numerous to mention.

From a reading of the previous cases it appears that the public policy of all our States and nation is to hold open the doors of all trades in order that each man may choose his vocation without meeting with unreasonable obstacles. Such a policy is the right of the individual and a benefit to the nation and so jealously is it guarded by our laws that no man can by voluntary agreement deprive himself of his right to pursue his trade.

Oregon Steam Nav. Co. v. Winsor, 87 U. S., 20; 22 L. Ed., 315;
Gibbs v. Consolidated Gas Co., 130 U. S., 408; 32 L. Ed., 984;
Hilton v. Eckersley, 6 El. & Bl., 47.

"A combination is a conspiracy at law whenever the act to be done has a necessary tendency to prejudice the public or oppress individuals and unjustly subject them to the

power of confederates in giving effect to the purposes of the latter, whether of extortion or mischief, and the same proposition in one form or another is laid down in all the criminal law (Bishop Crim. Law, Sec. 172; Desty Crim. Law, Sec. 2; 3 Chitty Crim. Law, Sec. 1138; Archbold Crim. Pr. & Pl., 1830").

Gatzow v. Buening, 106 Wis., 1; 49 L. R. A., 475;
McIlhany v. Chicago, etc., Exchange, 170 Ill., 556; 39 L. R. A., 373;
Com. v. Carlisle Bright, 40 (Pa.).;
State v. Stewart, 59 Vt., 273;
State v. Burnham, 15 N. H., 396;
Morris Run Coal Co. v. Barclay, 68 Pa., 173;
Klingel's Pharmacy v. Sharpe & Dohme, 104 Md., 218; 7 L. R. A. (N. S.), 976;
See Notes, Fowle v. Park, 33 L. Ed., 71.

POINT XII.

The relief prayed for will not interfere with the legal provisions of any of the arbitration agreements.

The entire combination of which we complain is based upon a series of agreements of different character, some of which were adopted by the parties voluntarily and some under coercion. There is the agreement of the Carpenters' Union forbidding its members handling open shop woodwork under certain penalties, and the agreement of its members to submit to any penalties imposed if they fail to quit work on order of the delegates; there is the agreement, Exhibit C, of the Manu-

facturing Woodworkers' Association, and over 150 other union mills in New York City, which in effect provides that the union will protect those manufacturers from open shop competition by refusing to handle open shop material, in consideration of the manufacturer agreeing to employ union men exclusively and not to purchase open shop woodwork. There are also the agreements of Arnstein, Edmonds and Werbelovsky, in which each of these dealers agree not to handle open shop material of a certain character under a penalty of $2,500; the agreement of the Van Nest Woodworking Company agreeing not to handle non-union material under a penalty of $1,500; the agreements of Church & Gough, Schwarz and Beckmann, each of whom are builders, who have separately and independently agreed not to handle non-union trim in the future on condition that certain building operations which had been struck might be allowed to continue, and the agreement, Exhibit B, of the Master Carpenters' Association, wherein the master carpenters, as the price of peace and arbitration, agreed not to handle open shop material. All of these agreements, in so far as they relate to non-union material, are but details of a gigantic combination which show to what extent the open shop commerce has been destroyed, and all of them will be affected in so far as they are in furtherance of this conspiracy if an adequate injunction is granted. In so far as the provisions of any of these agreements are illegal, it is immaterial that all of the parties thereto are not before the Court, because the illegal clauses constitute a conspiracy and not a contract, which brings them under the well-recognized doctrine that in tort cases the plaintiff may sue one, any, or all (Hopkins v. Oxley Stave Co. 83 Fed., 912, C. C. A.; McConnell v. Camors-

McConnell Co., 152 Fed., 321). Every conspiracy is an agreement and it is absurd to claim that none of the parties to that agreement can be brought to account for their wrongdoing unless all of the conspirators are made parties to the litigation.

The only agreement which the prayer for relief specifically mentions is the agreement, Exhibit B, between the Master Carpenters' Association, with its 100 members, and the Joint District Council of the Carpenters' Union with its 22,000 members. Paragraph 2 of the prayer for relief asks that those sections of Exhibit B which forbid the use of non-union material be declared void, and paragraph 3 asks that the parties to Exhibit B be enjoined from carrying out or pursuing the provisions of that agreement "so far as the same forbids the purchase, use or installation of products manufactured by any of your orators," and "inducing or persuading, or attempting to induce or persuade any person, firm or corporation, to extend, renew, carry out or comply with said agreement * * * so far as the same prohibits the purchase, use or installation of non-union woodwork," etc. The granting of these provisions of the prayer for relief are in accord with sound precedent and will tend to clarify the relations between the master carpenters and the union defendants as well as to protect the master carpenters from interference when they purchase the open shop products, which is the very object of this suit. It is the usual practice in cases involving combinations in restraint of trade, to nullify and restrain the enforcement of the illegal clauses and such procedure lies at the very foundation of equitable relief in cases of this kind. The carrying out of illegal by-laws between members of an association to the injury of non-mem-

bers is shown by numerous authorities which we have already cited, including authorities involving the same combination as the case at bar.

> "We think it is competent for the Court to declare the agreement complained of as illegal and void and to restrain the parties to the agreement from keeping its terms or demanding that they be kept, and thus leave the respondent corporations and each of them free to deal or not to deal with the appellant as they may choose."
>
> Walsh v. Assoc'n of Master Plumbers (*supra*).
> U. S. v. Reading (*supra*).

It would be absurd to claim that the conspiracy in the case at bar was illegal and the agreement between the master carpenters and the union to use only union trim was a part thereof and illegal, as stated in the case of People v. McFarlin (*supra*), but that the parties to said illegal restraint could not be enjoined from carrying it out in combination.

The contention that such relief would nullify the legitimate provisions of agreement, Exhibit B, of which there are many, is without reason, for the parties to that agreement apparently had a guilty consciousness of the illegality of certain of its provisions and by an express provision thereof provided in Article 12 thereof, as follows:

> "If the Courts of the State or City of New York should decide that any clauses in this agreement should be unconstitutional or illegal, it shall not invalidate the other portions of this agreement, but any such clause or clauses shall be stricken out."

Even in the absence of such a stipulation, there is no doubt that the illegal portion of the agree-

ment may be condemned and the balance allowed to stand.

U. S. v. Bradley, 10 Peters, 343; 9 Ed., 357;
Oregon Steam Navigation Co. v. Winsor, 20 Wall., 64; 22 L. Ed., 319;
U. S. Cons. Raisin Co. v. Griffin, 126 Fed., 364;
22Cyc., 866;
9 Cyc., 564.

The only portion of the agreement which is here attacked is that part which does not relate to the parties' own business but to "other people's business." The provision against open shop woodwork has no logical or rational bearing upon the relations of the parties thereto and was inserted therein for the sole purpose of affecting the conditions of employment between third persons working in factories in which the parties to agreement, Exhibit B, have no connection or financial interest. It is useless to contend that the parties to agreement, Exhibit B, are simply following their own business in their own way, when the sole object of this provision is to control the conditions of employment between other persons in distant places and at a different branch of the trade. *There is an obvious distinction between an arbitration agreement for the mutual settlement of business relations between the parties thereto and a boycotting clause against strangers to which one party is obliged to yield in order to obtain the priceless advantages of industrial peace.*

POINT XIII.

The complainants are entitled to an injunction under the Act of Congress approved October 15th, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Lawful Purposes."

Section 16 of this Act, the Clayton Act so-called, reads as follows:

> "That any person, firm, corporation or association shall be entitled to sue for and have injunctive relief in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the Anti-Trust Law, including Sections 2, 3, 7 and 8 of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings."

This section is declaratory of ancient common law principles and is highly remedial, and should be construed so as to advance the remedy. The radical disagreement among the judges of the various inferior Federal courts as to the right of private litigants to maintain such suits, and the failure of some of them to correctly interpret the decision of this Court in Minnesota v. Northern Securities Co., 194 U. S., were notorious, and many cases were pending in the courts whose fate depended upon the proper construction of the existing law. So this provision was manifestly inserted to remove that doubt. It was a legislative declaration of the intent of an existing law as to

remedies and was intended to guarantee the equitable remedy to every one needing it. In construing such a law, the rule is to give it, in courts of equity, a retrospective meaning, and to make it applicable to all pending suits, whether in courts of first instance or in appellate courts and regardless of whether a decree has been entered in a lower court or not, from which an appeal is pending. A court of equity under such circumstances will not drive a litigant from its doors with the invitation to come again upon the same facts for the necessary relief. Moreover the wording of the section stamps its meaning upon it. Its provisions not only give the right to *"sue for"* but to *"have"* injunctive relief.

Repeated decisions of this Court illustrate this principle. The case of Bailey v. Clark, 21 Wall. 284, which involved a suit to recover taxes illegally exacted, is in point. When the case reached this Court on Appeal, a law had been passed by Congress which clearly relieved the plaintiff from the liability for the taxes claimed. This Court then said:

> "This enactment was evidently intended to remove any doubt previously existing as to the meaning of the statute and declare its construction and meaning. Had it been intended to apply only to cases subsequently arising, it would undoubtedly have so provided in terms."

See, also,

Tiger v. Western Investment Co., 221 U. S., 286; 55 L. Ed., 739.

The case of Missouri T. R. Co. v. U. S. (189 U. S., 273), involved the right of the attorney general to proceed against the rail-

road for discrimination on the request of the Interstate Commerce Commission without previous hearing or finding by that Commission or notice to the railroad. Demurrer to amended bill was overruled and an injunction was issued from which an appeal was taken to this Court. After the decree was entered the law was amended so as to clearly authorize such a suit. This Court held that the suit could not be brought under the law existing at the time of the entry of the decree, but held it proper to apply the amended act which was passed after the decree was entered. Mr. Justice White in rendering the opinion of the Court, said:

> "Testing this question by the law which was in force at the time when the suit was begun and when it was decided below, we are of the opinion that the authority to bring the suit did not exist. But this is not the case under the law as it now exists, since power to prosecute a suit like the one now under consideration is expressly conferred by an act of Congress adopted since this cause was argued at bar. * * * Although by the fourth section of the Act, conflicting laws are repealed, it is provided: 'But such repeal shall not affect causes now pending nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this Act.' We think the purpose of the latter provision was to cause the new remedies which the statute created to be applicable as far as possible to pending and undetermined proceedings brought prior to the passage of the act to enforce the provisions of the Act to regulate commerce."

In the case of Dinsmore v. Southern Express (183 U. S., 116), this Court had before it the question as to whether express com-

panies were exempt from the War Revenue Act of 1898, and disposed of the case by applying the law of March 2nd, 1901, which was passed after the case had been decided by the Circuit Court of Appeals. This Court said:

> "Although this cause was determined in the Circuit Court of Appeals and was submitted here prior to July 1st, 1901, our judgment must have some reference to the Act of 1901. In United States v. The Peggy, 1 Cranch, 103, 109, 2 L. Ed., 49, 50, the Chief Justice, delivering the opinion of the Court, said: 'It is in the general, true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the Appellate Court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation.' "

In the case of Sampeyreac v. United States, 7 Peters, 222, a right of review was created by the Act of 1830, while the suit was pending, and this Court said:

> "But considering the Act of 1830 as providing a remedy only, it is entirely unexceptionable. It has been repeatedly decided in this Court that the retrospective operation of such a law forms no objection to it. Almost every law providing a new remedy affects and operates upon causes of action existing at the time the law is passed."

In the case of United States v. Schr. Peggy, 1 Cranch, 105, this Court recognized the obligation in certain cases to apply a statute enacted subsequent to judgment, and said:

"But if, subsequent to the judgment and before the decision of the Appellate Court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties. But in great national concerns, where individual rights acquired by war are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import, and if the nation has given up the vested rights of its citizens, it is not for the Court, but for the Government, to consider whether it be a case proper for compensation. In such a case, the Court must decide according to existing law, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside."

We submit that in the case at bar, which is an equity case seeking only an injunction and not damages, the Court should recognize the complainants' right under the Clayton Act, if necessary to sustain their cause of action, rather than compel them to resort to a new and costly suit which could have no other result than the one now sought. This is but the corollary of the doctrine laid down in Pennsylvania v. Wheeling Bridge Co. (*supra*), which recognized that in equity cases involving a decree which projects itself into the future, this Court on appeal will recognize the law as it exists when the appeal is heard and will not limit itself to the law in existence at the time of judgment.

In this connection it is proper to point out that

Sections 6 and 20 of the Clayton Act do not interfere in the least with the right of the complainants to maintain this suit for an injunction as the defendants, perhaps, may now contend. Those sections have not changed the law as it stood when this suit was commenced and especially have no application to cases of this character.

It was not the intention by Section 6 to change in any respect the Sherman Anti-Trust Act as it had been construed and applied by this Court in any case. The history of the legislation, shown by the committee reports and even the debates in Congress, establishes this. The Senate Judiciary Committee in its report, said: "It is well, at the outset, to state the theory of the bill, both as it passed the House of Representatives and as it is proposed to be amended, for the general scope of the House measure is unchanged. It is not proposed by the bill or amendments to alter, amend or change in any respect, the original Sherman Anti-Trust Act of July 2, 1890. The purpose is only to supplement that Act and the other Anti-Trust acts referred to in Section 1 of the bill." And the Senate Committee also quoted from the report of the House Committee to the same effect as follows: "The bill does not interfere with the Sherman Anti-Trust Act at all; it leaves the law of conspiracy untouched and it is not open to effective criticism on any constitutional ground." Moreover, the Act in Section 4 re-enacts, word for word, Section 7 of the Sherman Anti-Trust Act, under which the Loewe case was brought to and decided by this Court, without excepting that or any other case from its provisions, which action, upon established principles of construction, is an adoption by Congress of the doctrines of that case.

The presence of Section 6 in the Act is due to the fact that it was thought desirable to put at rest the contentions of some, that the existence of labor unions for legitimate purposes was forbidden by the Sherman Anti-Trust Act, notwithstanding the declaration of this Court in Adair v. U. S., 208; U. S., 178, which was under consideration by it along with the Loewe case and was decided just one week before it, to the effect that Congress, under its power to regulate commerce, had not prohibited and could not prohibit the existence of labor organizataions as such. This Court had there said:

> "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have in itself and in the eye of the law any bearing upon the commerce with which the employee is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of their members as wage earners—an object entirely legitimate and to be commended rather than condemned. But surely those associations as labor organizations have nothing to do with interstate commerce as such. One who engages in the services of an interstate carrier will, it must be assumed, faithfully perform his duty, whether he be a member or not a member of a labor organization. His fitness for the position in which he labors and his diligence in the discharge of his duties cannot in

> law or sound reason depend in any degree upon his being or not being a member of a labor organization. It cannot be assumed that his fitness is assured, or his diligence increased, by such membership, or that he less fit or less diligent because of his not being a member of such an organization. It is the employee as a man and not as a member of a labor organizaaiton who labors in the service of an interstate carrier."

Section 20 has obviously no application to the case at bar. It is limited to cases "between an employer and employees, or between employers and employees, or between employees or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment." It is obvious that none of the defendants is or has been or probably ever will be an employee of any of the complainants, most of whose factories are situated over a thousand miles away from the State where defendants reside. The limitation with which this section commences therefore excludes its application to the case at bar.

It is further obvious that the various acts mentioned in Section 20 against which injunctions shall not issue in this limited class of cases, are most of them acts *which in and of themselves* are ordinarily lawful, and that this section accomplishes no other purpose than to declare the previously existing law on this subject. If, as stated by this Court, not even the recognition of a right by the Constitution can justify its exercise in furtherance of a criminal plot (Aikens v. Wisconsin, 195 U. S., 194), or the constitutional privilege of free speech cannot be used as a defense to an injunction which restrains speech or writing, to further an illegal conspiracy (Gompers v. Bucks Stove & Range Co., 221 U. S., 439); then it cer-

tainly follows that the recognition of a right by a statute such as the Clayton Act, will not justify the exercise of that right in furtherance of a criminal conspiracy, which is expressly defined by the same statute. When these acts are used in furtherance of a criminal plot, they become acts of an entirely different character from those described by this section, for they are colored, and their character determined by the illegal plot. This section does not mean that all of the specified acts therein described may be utilized for any and all unlawful and criminal purposes, and to give it such construction would make it unconstitutional because it would destroy the only available remedy to adequately protect citizens from irreparable injury to their property rights by acts obviously calculated and intended to inflict such injury. Under such construction, the United States Steel Corporation could destroy its competitors by arrangements with the union whereby they would call strikes on every railroad, in every factory and on every building where competitors' products were used. No injunctions could issue under the authority of Bitterman v. Louisville & Nashville R. R. Co. (207 U. S., 205), and vital provisions of the Interstate Commerce Act and the Civil Service laws, would be *pro tanto* repealed.

The law would also be unconstitutional as class legislation and depriving persons of property without due process of law, if it were so construed. While it is true that laborers as "vendors of services" may be properly exempted from the application of such a law when confining themselves to their activities as laborers (International Harvester Co. vs. Missouri, 234 U. S., 199), it does not follow that they can be constitutionally exempted when they attempt to control

the sale and distribution of commodities. A valid exemption of labor organizations may be made on the ground that labor occupies a different relation to trade and commerce from that occupied by manufacturers and dealers; but when laborers put aside their peculiar relation to trade and commerce, which is the only basis for their exemption, and assert and exercise an interest and control of the same character as is exercised by manufacturers and dealers, then they must be subject to the same law. Laborers engaged in selling products cannot be exempted from the laws applicable to vendors of products, on the ground that they are laborers, and the same rule applies when, by the use of a trade mark or union label, they assert an interest in articles of commerce and endeavor to restrain competition in the sale and distribution of competing articles. Any construction of the Clayton Act which would allow a labor union engaged in a manufacturing or mercantile business to escape the operation of this law on the ground that it was a labor organization, would be unconstitutional, and any construction which permitted labor unions to control the sale and distribution of commodities throughout the channels of interstate commerce, would likewise make it invalid. In the case at bar, where the labor union defendants joined a combination with manufacturers to restrain interstate commerce, it is constitutionally impossible that one should be held innocent and the other guilty. By the fundamental law of conspiracy, each member pursuing the common design is responsible for all acts done by the other, so that if the employers, under the terms of the Sherman Act, are committing a crime in furthering the common design, then the labor unions confederated with the employers must also be liable. By uniting with the

employers in furtherance of this design, they have eliminated differences between capital and labor, which might otherwise permit exemption from this law.

The case of Cleland v. Anderson, 66 Neb., 252; 92 S. E., 306; 5 L. R. A. (N. S.), 136, was concerned with the construction of an anti-trust law which exempted organizations of laboring men, and upheld the construction for which we are contending, while at the same time indicating that any other construction would destroy the validity of the statute. Concerning the statute, the Court said:

> "In its letter and spirit it refers only to combinations and conspiracies of persons engaged in the manufacture, sale and transportation of goods, wares and merchandise to prevent or hinder competition and regulate and control prices. No express exception of organizations of laborers intended to maintain or advance wages was necessary to exempt them from the operation. The section in question is inserted rather out of abundance of caution to prevent judicial extension of the terms of the act beyond its scope and purpose, than to grant a privilege or immunity to persons who would otherwise fall within its terms. The distinction between goods and merchandise produced by skill and labor and the skill and labor which produce them, is manifest and reasonable. The statute does not say that laborers who have goods, wares, merchandise, the product of labor, for sale, may combine to advance or control the price, but only that the law designed to prevent combinations in restraint of trade in such articles when produced, shall not be construed to affect organizations formed to regulate the wages or compensation of the labor and skill which produce them."

See also:

Connolly v. Union Pipe Co., 184 U. S., 540; other cases page 125 (*supra*).

We submit that in view of the history of the Act, its express reaffirmance of the Anti-Trust Act, the obvious reading of these sections themselves, and the unfortunate consequences and constitutional questions which would arise by any other construction, these two sections of the Act to supplement the Anti-Trust Law can only be construed as a declaration of the law as it previously existed, as to the legality of labor unions and their activities.

POINT XIV.

It was proper for the complainants to unite as co-plaintiffs since they were all similarly affected by the same combination.

The persistence of the defendants in questioning the right of the complainants to unite in this one suit leads us to take up this question, which we think is well settled by authority. Each of the complainants is engaged in the same line of business and all of the acts complained of in the bill of complaint affect the sale of the products of each of them in substantially the same way. Under such circumstances it can hardly be questioned that the joinder of the complainants was not only proper but commendable. To have commenced eight different suits—which these eight complainants might well have done—would have been to vex and annoy the defendants unnecessarily and to have correspondingly increased their costs and expenses. The joinder is of advantage

to complainants, defendants and the Court and is well supported by the following authorities:

Bitterman v. L. & N. R. R. Co., 207 U. S., 205;
Key West Cigar Mfrs. v. Rosenbloom, 171 Fed., 296;
James B. Sipe & Co. v. Columbia Refining Co., 171 Fed., 295;
Wickwire Steel Co. v. New York Central R. R. Co., 181 Fed., 316;
Pillsbury, etc., Mills Co. v. Eagle, 86 Fed., 608;
Liverpool, etc., Ins. Co. v. Clunie, 88 Fed., 160;
Hale v. Allison, 188 U. S., 76;
Lonsdale v. Cook, 44 Atl. (R. I.), 929;
Madison v. Ducktown Co., 83 S. W. (Tenn.), 658;
Wilkie v. City of Chicago, 188 Ill., 444;
Tift v. Southern Ry. Co., 123 Fed., 789;
Lytle v. Galveston Ry. Co., 99 S. W., 396;
Pomeroy Eq. Jurisprudence, Secs. 245-69;
Strobel v. Kerr Salt Co., 164 N. Y., 322;
Osborn v. Wisconsin, 42 Fed., 825;
Schwarcz v. Garment Workers, 124 Supp., 968;
Davies v. City of Seattle, 121 Pac., 987 Wash.;
Goldfield Consol. Mines v. Richardson, 194 Fed., 198;
Greer v. Smith, 140 Supp., 43;

Guy Blas Dry Goods Co. v. Reinmari, 143 S. W., 1087 Ark.;
Bradley v. Bradley, 165 N. Y., 186;
Hawarden v. Youghiogheny, 111 Wis., 545; 55 L. R. A., 830;
Smyth v. Swormsted, 16 How., 288; 14 L. Ed., 842;
Beatty v. Kurtz, 2 Pet., 566; 7 L. Ed., 521.

We submit that for the reasons stated in this brief the Court erred in dismissing the Bill and the Complainants should be awarded an injunction for the protection of their business.

Respectfully submitted,

DANIEL DAVENPORT,
WALTER GORDON MERRITT,
Solicitors and of Counsel for Appellants.

Office Supreme Court, U. S.
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No. 480

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

PAINE LUMBER COMPANY, LIMITED, and others,
Appellants,

against

ELBRIDGE H. NEAL, etc., and others,
Appellees.

On Appeal from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF THE LABOR UNION DEFENDANTS-APPELLEES

CHARLES MAITLAND BEATTIE,
Solicitor and Counsel for the Labor Union Defendants-Appellees.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914,

No. 480.

PAINE LUMBER COMPANY, Limited, *et al.*,
Appellants,

against

ELBRIDGE H. NEAL, etc., *et al.*,
Appellees.

BRIEF IN BEHALF OF THE LABOR UNION DEFENDANTS-APPELLEES.

Statement of Facts.

We assume from the brief of appellants that in this Court appellants intend to confine themselves to the position that the so-called conspiracy is impersonal, that in what these defendants have done they have had no particular mill in view. If this be so, and we are not certain the brief throughout sustains this position—the case is simpler than the double position taken in the complaint and in the lower courts that the so-called conspiracy was against the non-union world in general and also was specifically and maliciously directed against the complainants (36). If the so-called conspiracy is impersonal—a mere declaration of principle, this case is apart from the case of *Irving* v. *Neal*, 209 Fed. 471, referred to in the "preliminary statement" in appellants' brief (page 2), which involved the same defendants, because the Court there found: "The proofs show a persistent campaign has

been made by the combination to compel them to unionize their shop." What few and unfortunate facts gave the Court that idea we need not consider here, but we submit that in the record in the case at bar there is no evidence suggesting any malicious motive or intent as to any non-union mill, but a desire to treat the products of all non-union mill work alike.

No stronger evidence of the impersonality of the position of these defendants is presented than the proofs which show that even at the City of New York, where alone they are strong enough to assert their principle not to work on non-union materials, they nevertheless work on and install non-union mill products which their own members in union mills do not make. Of course, such non-union mill products as those of plaintiffs are included. This is shown by the contract Exhibit "B" of the complaint (83) and the exceptions in the different contracts with dealers in mill work (425, 553, 566, 685, 2389). There is no question but that the excepted mill products which their own members do not make, are erected by the other members of the union regardless of what mills they come from.

It is to be noted at the outset that such mill work as complainants make bears no label even if made in union mills and does not have the name of the maker, so that it is impossible for carpenters, except by having some one to trace mill work, to ascertain whether mill work put before them is union or non-union. Obviously in any place where the carpenters' union is strong enough to cause delay to the employer in getting other help, it is to his interest not to tell his carpenters whether his mill work is union or non-union. One in every five members of the Brotherhood of Carpenters works in union mills and the other four work on buildings, their duty being in part to install mill work. There are no union mills in this country or Canada, except those manned by members of the United Brotherhood of Carpenters, and the non-union mills in the country far exceed in number the union mills (6217).

NO INTERSTATE ACTS INVOLVED.

Here we desire to correct a false impression which the plaintiffs have adduced and insist upon, that national activities bearing on the plaintiffs' businesses, as well as the business of other non-union mills, are shown in the record. To correct this false impression is all important so far as federal questions are raised in the case. This national conspiracy, as plaintiffs contend, is based on a general refusal of the union carpenters who work on buildings, called "outside" carpenters, to work on non-union mill products. Not but what, as we urge these outside carpenters, members of the United Brotherhood, would have the right nationally to take this position, so as to protect the inside members who work in the only union mills in the country, or even for the philanthropic purpose, if we may call it such, to increase their members and spread higher wages and lighter hours by unionizing other mills, *but the facts are, there has been no such national action.* The record shows by evidence and necessary inference, that outside a part of the City of New York, the union is not strong enough to refuse to handle non-union products. The country is flooded with non-union mill products, and there is no proof that a builder cannot get all the non-union help he wants anywhere, if his union craftsmen refuse to handle the non-union material he puts before them. The only so-called unlawful act charged against these defendants is a refusal to work, that is inaction. No such refusal has been shown outside of the City of New York, and very little in it, owing to certain arbitration and trade agreements.

There is in the record considerable evidence of efforts to unionize non-union mills. *But the record fails to disclose any evidence suggesting an effort to bring this unionizing about by striking non-union mill products except at the City of New York.* Proofs that some unidentified men had asked some of the plaintiffs to unionize their mills, would indicate that the unionizing is done by persuasion.

If they did refuse anywhere else than in this part of the City of New York, it is evident from the failure of plaintiffs to show such refusal that the builders would put on non-union carpenters to install these non-union mill products, and that plenty of non-union carpenters are available all over the country for this work. Plaintiffs have not shown that their businesses have suffered a dollar's loss in the many years this conspiracy has proceeded, outside of the City of New York. The inference is fair, that elsewhere they have either held their own or gained. There are plenty of statements in the publications of the carpenters' union all of which were open to plaintiffs, of progress in unionizing mills, and expressive hopes of officers of the union that in time the mill work world would be unionized. But where is the evidence that any mill in any part of the country was unionized by a refusal of union carpenters to work on non-union products, and how far has this unionizing gone? No answer from complainants, and that was a necessary part of their case.

There is no national significance to this case as there are none of the alleged national activities in the record. False deductions are made from reports of the union's officers and resolutions, and the hopes and aspirations of its orators. In the many volumes of printed matter published by these defendants, copiously used in evidence by appellants, there is much matter of the sort referred to, to show the plaintiffs that activities of some sort were appearing in different parts of the country. But their own bookkeepers could have told them they were losing nothing outside of New York City. They evidently had the desire to give a wide significance to this case. Taking first the proofs outside of the City of New York, let us see what we have of national effect.

NUCLEUS OF THE CONSPIRACY IN 1904.

Appellants declare the national conspiracy began by the adoption of an amendment to the carpenters' constitution in 1904. Appellants make this assertion in the face of their own proof of expenditures of the union for fighting non-union labor and mill work for 23 years before 1904, but confining ourselves to 1904, we will examine this foundation of the conspiracy. The resolution reads:

> "It shall be the duty of all district councils and local unions to promote the use of trim and shop-made carpenter work bearing this label and, wherever possible, to prevent the members under their jurisdiction from encouraging the use of any unfair material by handling the same."

It is not disputed in the evidence that the carpenters' union label is not used on such products as the complainants make, even when they are made in mills manned by members of the Brotherhood. So the recommendation or provisions in the above resolution on which this so-called conspiracy rests, in so far as it affects the union label, is ineffective. This leaves the provision about preventing members from encouraging the use of unfair materials by handling the same. There is no penalty attached. *The resolution is far from obligatory in form*, and was passed as a substitute for a resolution which stated that "no member of the U. B. shall be allowed to handle or put up building material coming from a non-union shop or mill located in a district where a majority of the mills are organized" (2173).

The resolution which was made part of the constitution and the proposed resolution just cited, both contemplate further action before they are to be put into effect. They are a declaration of a principle of the organization. If there is any district in the United States where "a majority of the mills are organized," it has not so appeared in evidence.

As indicative of nation-wide activity the appellants then select reports of different officers of the United Brotherhood and proceedings of conventions published at length in the printed journals of the order. The record shows that appellants have had before them all the proceedings of the Brotherhood of Carpenters from the year 1904, including the monthly publication called "The Carpenter" and the large volumes of reports of the biennial conventions of the Brotherhood of Carpenters. So if there were evidence of any national illegal activities along the lines suggested, we should expect to see it in the record.

They present first along this line in their brief (9) a report of the secretary, of moneys spent in their "refusal to work with non-union men and to handle non-union materials" (2767). It is to be noted that this report of the secretary was made to the convention of 1904, which passed the very resolution on which they claim the conspiracy rests. And now turning to the evidence referred to in the above statement of appellants' brief, we find (2167) this report of the secretary: "Our unions in the enforcement of their local rules—refusal to work with non-union men and to handle non-union material have, *within the past twenty-three years*, spent the sum of $184,776.22. Our district councils have also spent during the same period for the same or similar purpose $715,000, making a total in all of $899,776.22. The general office in support of trade movements during the same period, paid out $486,190.47." There is no data presented from which we can separate what money was spent of the above sums during those twenty-three years before the alleged conspiracy, in connection with refusal to work with non-union men, or the refusal to handle non-union materials. As to proof of the expenditure of money in favor of the alleged conspiracy appellants stop with the date of the conspiracy, 1904, and with all the subsequent printed books and records of this organization before them and referred to off and on as to other matters, appellants fail to refer to any proofs since 1904

of expenditures either for refusal to work with non-union men or material.

From the rest of the report it is evident that these moneys were spent in different trade movements, of which the report says, there were many during the two years prior to the report, and the period covered is *the twenty-three years prior to 1904* when this alleged conspiracy began by the previously stated amendment to the constitution.

The next statement regarding national activities, in their brief, is the report of a former president, Mr. Huber, who says that they had organized 200 mills in various cities. That in many localities the outside carpenters are ready to help the inside carpenters, and in many others they have no use for the men in the mills (Appellants' Brief, 9).

This report of Huber was also made to the convention in the year 1904, although appellants' brief does not say so, and it states (2171) "*in the past two years* we have done our best to organize the mills that manufacture material for the construction of buildings. This work has been carried on by our organizers throughout the country. Instructions have been given them to use their best endeavors along these lines and the result has been quite surprising, as we have been able to unionize over 200 mills in various cities of the United States and Canada. * * * In many localities we find that the outside carpenters are heartily in favor of lending a helping hand to bring about the desired result. In other localities the outside carpenters have no use whatever for the men working in the mills. As some say, 'they are a drag on the journeymen carpenters.'"

In that report is shown the fallacy of appellant's position that the national unionizing of mills is brought about through the refusal of carpenters on buildings to work on non-union mill material. It is not explained why

plaintiffs were not affected by the activities against non-union men and trim for the 23 years prior to 1904.

Appellants' brief then tries to show conspiracy from reports made by different officers to other officers, or to the conventions. What they have selected from these reports of many years fails utterly to show any national activities to prevent the sale of non-union material by refusing to work on it in any part of the country, except perhaps in a part of the City of New York.

These officers, whose reports plaintiffs submitted, are naturally enthusiastic union men, as their reports show, but they give no basis in figures for their prophesies of general unionization of the mill world. For instance, plaintiffs quote former President Huber who says: "I clearly see the coming of the day when, the open shop being declared in any city, our organization will at least be in a position to put up a good strong and energetic fight against any employer of that city in any locality where he may have work" (2174).

The above quotation, correctly understood, shows the real condition of the carpenters' trade through the country. It indicates that as the trade now is, an employer buying non-union material can outside of a part of the City of New York at least get plenty of help to put up his non-union mill work without looking for union labor.

If it is intended to give the impression by this extract that "fight" means anything more than a refusal to work, so far as labor is concerned, it is error. *There is no intimation in this case of any interference with an employer who wants to get other men to put up his non-union mill work, or to boycott, hurt or injure him in any way.*

Roseate statements of Organizers Hickey, Cook and others, are referred to in the brief of appellants (10-14), but there is no where a statement to indicate anything unlawful in the manner in which they say they expect to

unionize different mills or have done so, nor any suggestion that this is being done through the declining of members of the union to work on non-union material. There is nothing to indicate that in any part of the country if a union carpenter declines to work, that the employer cannot fill his place. Even at the City of New York where the union is stronger than in any other part of the country, the only employer who advertised for carpenters testified that he had more non-union carpenters call on him than he could employ (626).

There are many carpenters in Manhattan, as well as in the other boroughs, who are not members of the Brotherhood (2382). There are about 7,900 non-union carpenters in Brooklyn (2383). The Brotherhood members in the whole city, both inside and outside carpenters, number from 15,000 to 17,000 (2381). Outside of non-union carpenters in this city who work on buildings there is a rival organization of outside carpenters of upwards of 900 members and another of about 400 members of outside carpenters (2382-83).

There is no suggestion in the case that the union carpenter interferes with an employer who desires to use non-union carpenters to do his work. So far as part of the City of New York is concerned, it was shown that a number of other union trades will not work with non-union carpenters or other non-union mechanics but it was not shown but that an employer can get all the non-union men he desires in any trade to do his work. An employer has no call on the labor of union mechanics, who work by the day.

It cannot be contended that there is any interference with interstate trade because the employer instead of employing non-union men whom he can readily get, desires to employ the union mechanics. And, if because of this desire to employ union mechanics, he will not buy non-union goods, it is not clear where any law has been vio-

lated by the mechanics or by the employers in choosing the goods of union mills.

Essential to establish a case along the theory that the acts of the defendants tended to form a monopoly, or that their acts were in restraint of interstate trade, would be evidence of the proportionate strength of the union and non-union mill industry of the country, and the proportionate strength of the carpenters working on buildings as between union and non-union men. Plaintiffs did not introduce any evidence to indicate the proportion in either case. They have given the figures of the membership of the United Brotherhood, so that the inference may be drawn that these carpenters have a controlling influence on that industry because of the size of their membership. That is, their arguments seem to be that because this organization has a membership of 160,000 carpenters who usually work on buildings and are known as outside carpenters and a membership of 40,000 men who work in mills and are known as inside carpenters, that these figures of membership are suggestive of controlling the industry.

In other words, they want the Court to infer, because of such figures, that there is an intent to control the industry and it has got to a menacing point because of these figures. As a matter of fact, the argument is just as good the other way: that a membership of 200,000 carpenters, of whom 40,000 work in mills, covering the United States and Canada is not large enough to suggest prospective control or interference with trade. Outside carpenters to the number of 160,000 men are not many in a trade like carpentry in a country of wooden dwellings of 100,000,000 population leaving out Canada, especially is this so, because this is a trade where it is commonly said every other mechanic at times takes a hand outside of the big cities, and it is said even that fishermen, at the close of the season, will take up carpentry in different

sections of the country. Customers of plaintiffs have no right to the labor of these defendants, and the less cause have they for complaint if these customers can procure non-union carpenters for the work. Want of proof that there is a dearth of non-union carpenters warrants the assumption there is plenty of non-union labor for complainants' materials.

Seven strikes only in 33 years involving any material of the eight complainants—and all seven in the City of New York only were proved. That is what the record shows these defendants have done to the complainants so far as quitting work is concerned. We add the 23 years where they show defendants spent money fighting non-union men and trim to the years since 1904 when they say the actual conspiracy began. No other strikes against complainants have been shown in any other part of the United States and Canada, except these seven at the City of New York. The "Appendix," attached at page 53 to the brief herein of Mr. Hulse, appearing for the master carpenters defendants, which in short form presents in a judicial way a summary of the evidence, will show at a glance the lack of evidence of national action to unionize mills by striking. As to the number of non-union and union mills in the country the defendants themselves offered some evidence. The very limited amount of unionizing so far accomplished is shown in the report of the President (2636), where he says that 1100 mills, cabinet shops and job shops have come under their jurisdiction. This covers the United States and Canada and there is no way to determine the number of non-union mills, cabinet shops and job shops of the United States and Canada. President Huber testified that there are a great many more non-union mills than union mills in the whole country.

If there were plenty of non-union carpenters to install the work of non-union mills, how could there be

any interference whatever with interstate trade? There is no proof to the contrary. If there are many more non-union mills than union mills, this union has not reached the menacing condition in which its declarations of desire to unionize the world ought to be enjoined.

The complaint (106) says that for many years the carpenters have carried on a conspiracy, (1) to prevent non-union carpenters from working, and (2) to prevent employers who do not employ union carpenters from engaging in interstate commerce.

Our previous general survey of the evidence covers practically all that appellants have thought necessary to put in their brief, regarding the evidence, covering this nation and Canada, outside of New York City. *There is not a particle of evidence that any non-union carpenter has been kept out of work, anywhere, including the City of New York, and there is no evidence whatever of any activities outside of the City of New York, in any part of this country or Canada, affecting the sale of a single piece of woodwork of any of the complainants, or its final installation.*

We may note here that the evidence shows that the outside carpenters and the inside carpenters interchange their places at different times. That is to say, the outside carpenter whose work on buildings is more strenuous than that of the mill man, will, in times of scarcity of work, go into the union mills to get employment. He will do the same thing when he may become ill or gets so old that he cannot stand the heavier work on buildings. On the other hand, the mill man will often go to outside carpentry, although the work in the mills is very hazardous and the proportion of maimed people among the workers is very large as shown in the evidence of the case, so that an outside carpenter declining to work on materials that are not made in a union mill, is really assisting him-

self in keeping open a shop where he may get work when perhaps unable to perform the heavier work on buildings.

PEACE FROM CHAOS IN MANHATTAN.

The turmoil in the different building trades in New York City before the arbitration agreement in 1903, in which there were many strikes and an employers' lock-out of nine months, is outlined, in the evidence of Otto M. Eidlitz, perhaps the largest individual builder in that city, and the author of the arbitration agreement (2517). The employers in the building trades had formed the Building Trades Employers' Association of about 1000 members, which brought about this great lock-out. In different trades, as among the carpenters, trade agreements were made between the master carpenters and the journeymen carpenters after 1903, which were consonant with the arbitration plan, Exhibit "A," of the complaint. And although the arbitration plan has expired, its scheme of arbitration and decisions made under it still live in the present carpenters' and other trade agreements, so that for several years there have been no sympathetic strikes in the Borough of Manhattan, City of New York, and few strikes. It is this carpenters' agreement against which judgment is asked declaring its trim clause invalid, as stated, which constitutes the main bulwark for present peace in the trade.

The brief of appellants has the heading for this part of the evidence (14): "Conditions in Manhattan and the Bronx." It is thus seen that the appellants do not even claim that the conditions against them are even spread over the whole of the City of New York. They go over the differences between the organizations of employers and employees, which culminated in the arbitration agreement of 1903. The employers in the buildings trades have their organization and a number of the journeymen's unions have their organization, in which mutual action is taken

to bring about an adjustment of differences. There is no provision in the constitution or by-laws of the Buildings Trades' Council consisting of unions of journeymen which permits a strike against non-union materials, such as non-union trim, so no joint action can be taken by the different trades involving trim alone. That association, appellants say in their brief, went out of business for "ulterior reasons" (18), with no occasion for the slur. Nor has the body which took its place any provision for striking trim.

As we have previously stated, there is no evidence in the case of the extent of the non-union labor industry in any of these trades, so it cannot be said as to how far an agreement among these different members of the Buildings Trades Council not to work with non-union men, can have any effect on the trade in non-union building materials in the City of New York.

Plaintiffs' cause of complaint in the City of New York seems to be that the 100 members of the Master Carpenters' Association have signed what we may call a sort of local option agreement, as the result of which they will only buy and handle union material, as the labor defendants understand, and that agreement, made between the Master Carpenters and the Brotherhood of Carpenters, is the main documentary evidence of a conspiracy in this city. That agreement, Exhibit "B" of the complaint, is the only one of the three agreements, Exhibits "A," "B" and "C" of the complaint, in which any prayer for relief is made in the complaint.

Exhibit "A" was the arbitration agreement of 1903, as stated made between all the unions of journeymen and all the unions of bosses in the different building trades for general adjustment of their differences. Exhibit "C" was an agreement between the Manufacturing Woodworkers' Association, of which four are defendants, and the United Brotherhood, regarding their relations in the mill work of these mills.

Recurring to Exhibit "B," we may say here that the parties to it are not before the Court. It was made between the Master Carpenters' Association and the Joint District Council of Carpenters covering New York City. About 100 individuals master carpenters are made defendants, but the Master Carpenters' Association is not a party to the action, and on what theory they can avoid Exhibit "B" with one of its parties not before the Court, is not clear. We may here say further that the United Brotherhood of Carpenters as a national organization is not before the Court. Both its president and secretary are named as defendants in the complaint, but they were not served with process. The Master Carpenters made defendants, numbering about 100, are not alleged to be conspirators in the complaint. They are not properly defendants and no relief is asked against them. There are about 2500 master carpenters contractors in the City of New York, but the 100 named as defendants are the largest builders. It was not shown that the union carpenters have any agreement with the rest of these 2500 Master Carpenters.

The object of the contract, Exhibit "B," as stated in its premises, is (81):

> "In order to prevent any strike or lockout, and to insure a peaceable adjustment and settlement of any and all grievances, disputes and differences that may arise between any employer in the Master Carpenters' Association and the mechanics affiliated with the Joint District Council of Greater New York."

The agreement states the terms upon which the carpenters are to be employed and provides for the arbitration of all disputes between the parties. The part objected to by the plaintiffs is the following sentence in Article 4, Section 2 (83):

> "There shall be no restriction against the use of any manufactured material, except non-union or prison made."

Counsel for the Master Carpenters, named defendants, have pointed out that the above statement in the agreement is no covenant on the part of the master carpenters that they will not use non-union trim. We do not see that it would make a material difference, as they contend that they as master carpenters, have the right to agree not to buy or use non-union trim, as well as the journeymen carpenters have the right to agree not to work on it.

The plaintiffs do not allege, as stated, that these master carpenters are conspirators against them, but they allege this agreement to which the master carpenters have become a party is against public policy in regard to the above clause, and they want it so decreed. Since the execution in 1910 of Exhibit "B" there have been practically no strikes in the building trade, sympathetic or otherwise, that is, in the City of New York.

Appellants' brief (23-27) refers to considerable evidence with regard to the insistence of the carpenters that this trim provision shall be put in Exhibit "B." There is no disputing the fact that these carpenters have all along asked that this clause be made one of the conditions of the agreement. The employers deny that the agreement, Exhibit "B," is a result of coercion. They are defending the action and the right to make that agreement in this suit. If, as Mr. Eidlitz testified, the agreement was the result of mutual concessions, the manner in which the agreement was brought about does not seem to be an essential element in this case.

If the concession of employers to buy union trim was removed, labor would naturally seek other concessions in its place and the old chaos would ensue. It is true that while this case was pending the employers have renewed the agreement with carpenters expiring January 1, 1913, (89) as the result of which they refuse to buy non-union mill products, but a decision against these defendants would give opportunity to such employers who are not dis-

posed to fair wages and hours to break away from the others, and so lead to the old general disruption.

The effect of the decree asked would put the carpenters at a disadvantage, says Mr. Eidlitz. Mr. Neal says as to the result: "It would bring about a crisis in the building trades here and result in the same absolute chaos that prevailed during 1903." And further that it would make "warehouses of the union mills" (2451).

There are many carpenters in Manhattan, as well as in the other boroughs, who are not members of the Brotherhood (2382). There are about 7,900 non-union carpenters in Brooklyn (2383). The Brotherhood members in the whole city, both inside and outside carpenters, number from 15,000 to 17,000 (2381). Outside of non-union carpenters in this city who work on buildings there is a rival organization of outside carpenters of upwards of 900 members and another of about 400 members of outside carpenters (2382-83).

There are many trades in the building industry in this City which are not affiliated with the Brotherhood (2347-2349). None of the trades affiliated with the Brotherhood will strike because of non-union mill work (2346-47). The Building Trades Council and the United Board of Business Agents, to which the Brotherhood belonged, went out of existence (2342-43) and the constitution of the first named set forth at pages 2672-74 is not in effect. Bodies succeeding these bodies have adopted no rule for striking against non-union trim (2346).

But plaintiffs say that carpenters will strike against non-union trim in the City of New York, and if the employer puts non-union men on the job, trades affiliated with the carpenters' union will strike against the non-union carpenters. The decisions on the rights of union labor in this State at least seem to concede the right of union men to strike against non-union men. Complainants to succeed would have to do away with the right to strike against

non-union men, or so amend the decisions *that union men may not strike against non-union men if the non-union men are working on non-union mill products.*

The reference in complainants' brief, to letters and lists of the year 1907 to employers, which contain names of so-called unfair mills, is a dead matter, as they were discontinued in that year. There is no dispute about that in the evidence. A long list of non-union mills (2667) produced by Mr. Harding is undated, and he said he received it about the end of the 1906 agreement. He does not say where he got it (2605). *Yet not one of the names of complainants is on this list.* Nor is the name of any of the complainants in the letter of July 20, 1907, containing several non-union mills (542), nor in any other list or letter produced in evidence. These letters or lists of non-union mills were not volunteered by the carpenters, they were called for by the employers to whom they were sent, called for by the builders whom complainants contend are coerced to buy union trim. The letter of Mr. Harding of the Building Employers' Association to the Joint District Council says (2391):

> "By the looks of things, October 26th meeting will run along until October 28th, that is if complaints keep coming in as they are doing at the present time. We will always have the same excuse (and a good one to my way of thinking) about not knowing that a shop was unfair until your people let us know who is fair and who is not. We have asked for this time and time again, but we get no reply."

We cannot reconcile the following statements of appellants. They say in their brief (29): "Since the agreement of October, 1909 (Exhibit B), there has been hardly a dispute about non-union trim (2603-4);" again (30): "The Manufacturing Woodworkers, who operate union shops and are beneficiaries of this boycott are unquestionably active in stirring up strikes against open shop material in order to secure the business for themselves." In

the first statement there has been peace since 1909—no need of strikes. In the second, the four union mills defendant are stirring up strikes. Where are the strikes they have stirred up? There is no record of a direct strike against the material of any of the complainants in ten years, and only seven strikes in which their material entered, or may have entered in the record. There are only five strikes referred to in appellants' brief as affecting complainants' trim (52, 56, 58, 59).

DAMAGES PROBLEMATICAL.

Several pages of appellants' brief (41-50) are devoted to alleged loss of business by complainants in part of the City of New York. Two of the plaintiffs, Lotham Cypress Company and the Curtis & Yale Company, have never tried to do business in New York. There was evidence of the general business depression and changes in the building rules requiring fire proof construction, which would have an important bearing on the loss of business of those plaintiffs who do business in that city. Any actual loss of business that could be associated with any of the defendants could only lie at the door of those buyers of trim who had decided that they would only buy union trim. *The plaintiffs do not raise the question of the right of the master carpenters to buy where they please.* They only question the right of craftsmen to work where they please.

Paine runs the largest mill of all the complainants. Appellants' brief (49) speaks of the loss of four customers of the Paine Company, who erect the goods they buy and who ceased to do business with the Paine Company about August, 1910, which appellants' brief says was "on account of the defendants' combination."

One of these four customers, and apparently the largest, was the City and Suburban Homes Company. Edward S. Wilson, purchasing agent for the City and Suburban

Homes Company, ought to know better than appellants if his company gave up dealing with Paine "on account of the defendants' combination." When Mr. Wilson was asked why he had in August, 1910, given up purchasing mill work for his large company from Paine, he testified in part as follows (650):

> "A certain reason I might state to be the fact, that the town here is full of rumors as to the character of the labor employed by the Paine Lumber Company—I have been given to understand (I don't know whether correctly or not) that they employ children and women, old men and I have even been told that they employ nursing women, and have stated hours that the women are allowed to leave their work to nurse the babies. I am free to confess I would not care to do business with that kind of a concern."

Plaintiffs did not call the other three lost customers; M. F. O'Neill, H. Raabe & Son and F. T. Nesbit & Co., to tell why they gave up business with the Paine Co. Plaintiffs did call a dealer who handled the Paine goods and asked him why his business with Paine in 1910 had fallen off, $10,000, and this dealer, Arnstein, replied (1486):

> "I just happened to buy my sash somewhere else. It increased with Gould. *They gave me better service and I bought sash of them.*"

An idea of how the union and non-union mill forces stand, we may note here incidentally. Referring to the Paine mill, it employs about 3,000 workers (1597). In all the union mills in the City of New York, and there are said to be about 200 of them, all the union carpenters employed run from 3,500 to 4,000 (2381). Including the outside carpenters in the City the total membership is 17,000 (2381). Paine has nearly as many employees, therefore, as all the union mill carpenters in 200 mills about the City of New York.

WOMEN-MADE WOOD WORK.

The testimony of Mr. Paine himself, shows that about 300 women and girls are employed in his mill. He said that he could not find that any of them were paid less than nine cents an hour (1649). It was not disputed that in his mill and the mill of at least another of the complainants, women were actually engaged in working at buzz saws to turn out this non-union mill work.

It follows these union men working on buildings are expected to complete the manufacture of the partly-done work of the women in mills. How a thing is made, appellants contend, is a matter not to be taken into consideration. *But Neal and other labor defendants testified that the fact that women and girls were so employed was one of their reasons for not handling this mill work.* It cannot be that when a manufactured article gets into the channels of trade it is so sanctified that free men cannot refuse to handle it for reasons at the source of its manufacture. This theory is that while there are limitations on the right of men to work at will, there is no limitation to free trade in an article of commerce. Yet we have the large customer of the Paine Co., the City and Suburban Homes Company, giving up the Paine goods because of these conditions in the Paine mill. *Can a purchaser of goods exercise this option, and a craftsman be compelled to work upon those very goods?*

COST OF UNIONIZING.

The wages which union carpenters in such mills as those of plaintiffs receive are $15.50 a week of 50 hours. To unionize, plaintiffs would have to do without the employment of women and girls, for there are no women members of the United Brotherhood of Carpenters. Mr. Paine testified, as stated, he could not find from his records that the women and girls got less than nine cents an

hour (1649). Some of the men employees receive as low as 12½ cents an hour, but the bench hands receive a minimum of 17½ cents an hour (1651). The Paine mill works ten hours a day. It figures out that the union mill man gets about 31 cents an hour as a minimum wage—for all union wages are minimum wages. Compared with the above minimum wages of women and men, labor in the Paine mill probably costs half what is paid in a union mill in the City of New York; that is, assuming women can run buzz saws as efficiently as union men, and the other non-union workers do as much work as union men.

THE FALLACY OF COERCION.

The theory of the plaintiffs that the hundred master carpenters named as defendants have been coerced in connection with these trade agreements, is not borne out by the evidence. The very fact that these master carpenters are a part of the strong association of 1,000 men engaged in all branches of the building trades, known as the Building Trades Employers' Association, ridicules the idea that these labor unions have them under coercion. But the American Anti-Boycott Association, which is conducting this case free of all expense to the plaintiffs (2848), proclaims it has come to the rescue of these coerced and powerful builders. They do not want to be rescued, it is true, and are fighting this case by different counsel. The plaintiffs also announce they want to succor not only the coerced builders but the non-union mechanics against whom this conspiracy is also directed. No non-union mechanic has cried out for this assistance. In fact it is not shown that one of them has been deprived of work. It matters not to these plaintiffs that Mr. Eidlitz has testified that Exhibit "B" was the result of concessions on both sides after the long chaos of strikes and lock-outs, nor has the fact changed the contention of complainants that these contractors have put in answers in which they denied the

coercion (127). No heed is given to the further fact that one of these large builder defendants, James Elgar, Inc., has also by answer denied the coercion and has individually employed counsel who have defended the case from the outset (173). Ignored also by the complainants is the fact that while this action was pending and the temporary injunction in force, *these coerced builders renewed the agreement* Exhibit "B" including the trim clause (which expired December 31, 1911), with these labor defendants (89).

Mr. Neal testified (2451):

> "Q. Since the extension of the agreement with the Master Carpenters in December, 1911, has the attitude of any of the members of the Master Carpenters been changed as to requesting the carpenters to work on non-union trim of (naming complainants)? A. To the best of my knowledge and belief, no."

Complementary to which is his testimony (2387):

> "Q. Is it your intention, and, so far as you know, the intention of these defendants, to act the same as to all non-union mill products? A. *All non-union mill products are shown the same consideration in the attitude of our men.*"

The complaint makes all these individual builders defendants, as stated, *but asks no relief whatever against them.* Are plaintiffs thus catering for their custom?

MOTIVES.

While the motives of these defendants are various, it is beyond question that they are acting for their own betterment, as they believe, and the betterment of all other men who may join their union. They are seeking a better standard of living, a standard that may be measured by a minimum wage of $15.50 a week, and for an eight-hour

day. A feature may be the unionizing of mills, but that is only another way of saying they seek an enlargement of membership—they are proselytizing for the spread of their doctrines of unionism. Aside from those features, which must pervade all union movements, the record shows here a number of other motives.

The outside carpenter wants to have running as many union mills as possible, so in winter and when aged, he can secure the easier work in mills. He wants to keep his fellow members in mills at work, and so sustain the dues and funds of the union, from which he and his family get sick, funeral, disability and other benefits. In this regard the public should be interested as the union saves many persons from becoming public charges. Another motive is that carpenter work is dangerous, and a member wants to know whom he is working with. We then have the abhorrence that union men have of completing the manufacture of women's work at this dangerous occupation. There is no suggestion of malice against any particular mill owners in the record, although there is plenty of good ground for it or indignation where women and children are so employed.

Some of the judges divide motives in conspiracy cases on the basis of distance from the overt acts, as immediate and ultimate motives. This has been called the tape-line method. That is the position taken by the Court in *Newton* v. *Erickson* (126 Supp. 949). The lawfulness of the conspiracy depends on the distance of the motive. All the above-stated motives seem to be immediate from our reading of the record herein.

Plaintiffs take the position that while a union may call a strike to better its wages or hours with an employer; and, they would probably further admit, if he employed a non-union man, that the union cannot strike against non-union material, because its ultimate purpose is to unionize the mill where that non-union material was made.

If a non-union man is put among them, they lawfully strike. A non-union newel post for a stairway is put before them, they must work on it and complete its manufacture. That cannot be good reasoning. Union men, on this theory, cannot act on ultimate motives. They cannot look ahead for their own advantage. Even if the motives above stated are not shown to be immediate in the record, we contend the perspective does not give legal significance to the motive in labor disputes.

But on the other division of motives as to paramount and incidental, it seems clear that the paramount motive of these men is to better themselves and such as become members.

METHODS.

This is another feature the courts resort to in determining the lawfulness of a combination. There is no suggestion in the record that anything other than peaceful methods have been resorted to by the defendants. The only weapon they have, or, are accused of using, is the strike. This action is brought not only to prevent them striking, but to compel them to work in the interests of the sale of non-union articles. We may say again, that if the defendants may strike, they have the right to say they will strike under certain conditions of work. Letters and circulars put in evidence which were issued by the defendants, contain no threats of any business troubles, except that if non-union material is put before the union carpenters, they will not work upon it.

There is no evidence of sympathetic strikes in the case. Doubtless owing to the agreements for arbitration and peace, the sympathetic strike has practically died out

(2531). The circular of defendants (132-135) cannot be unlawful, because it says:

> "We desire to inform you, that unless this material has been constructed under strict union conditions, we shall refuse to handle it."

It would be to the injury of a builder not to be informed in advance of the conditions under which the carpenters will continue to work.

Complainants claim an injunction should issue herein, because the officers coerced the working members into striking. The officer of to-day coerced the workingmen to quit, and when the officer's six months' term is over, the workingman elected to the same office, coerces the aforesaid officer. There is no proof that these officers do anything of the sort, or have the power to do it. In the few strikes disclosed in this record, it is clear that the carpenters quit work of their own volition. A rule of the union is put in evidence, under which members can be fined $10, who work on non-union mill work. The record showed, however, that this rule had never been enforced, and that there was no occasion to enforce it, because of the willingness of the men to quit work when they found non-union material was put before them. This rule only applied to the carpenters of the City of New York where, as we have said, all the evidence in this case centers, and it was not shown that any member was ever fined under that rule.

Stress is laid by appellants on certain evidence in the record to indicate that in and around the City of New York, efforts were made by the defendants to search out where non-union trim was being delivered. As we have said previously, trim is not so marked that carpenters can tell when it is put before them, whether it is union or non-union, unless they employ an officer to ascertain this fact. A carpenter on a job cannot safely refuse to work on any non-union material put before him.

FLAGRANT INJUSTICE OF INJUNCTION.

The union mills are the harbor of refuge for outside union carpenters when the inclement weather prevents building and they have been partly injured or are too aged to endure the more strenuous work on buildings. To compel the outside members to undermine the union mills where their fellow members work, by installing the products of non-union mills, would not only tend to drive their union members out of their mills, but would cut off an important field of work for the outside members, when driven to work in mills. It stands without reasoning that if the outside members handle materials made at lower wages and longer hours than the material of their own members in their own mills, that they would be dealing a severe blow at the maintenance of the higher wages and shorter hours in the union mills. This is what it is sought to compel the outside members to do. General President Huber testified (2074-75):

> "Q. Now, you spoke of carpenters, as they become aged leaving the work, leaving the outside work for mill work. That happens quite often, does it not? A. In thousands of instances.
>
> "Q. So that by providing, or helping to provide employment for men in the mills, you really assist in providing for your outside carpenters in time of age? A. That is one great object of our organization, to take care of the old men.
>
> "Q. And the action of outside carpenters, in declining to work on non-union material, has the effect of giving carpenters in the mills more work, and more security in their work, has it not? Is not that so, Mr. Huber? A. Sure, it is so."

Unemployed outside members seek employment in the union mills in winter (2386). Secretary Treasurer Neal of the Joint District Council of this city testified (2385):

> "Q. I understand it has been the custom in the past—men have been accustomed to change from

outside men to inside men, and *vice versa?* A. That has been the custom."

The danger which must be incurred by men who are not free to choose the conditions of their employment is an important element under this head. As we have stated, the Brotherhood imposes the qualification of skill on candidates for membership. This is evidently for their own safety as well as for the reputation of their guild. To disrupt the union mills where a member has confidence in the skill of his fellow union members with whom he works, would result in mills being organized where skilled and unskilled would be forced to work together (2385).

"Q. Do the men in the mills work together in such ways that, for instance, one unskilled man might, through the want of knowledge of the conduct of the business, increase the dangers of skilled men? A. Why there is no doubt about that. I could cite an instance of that, which I witnessed myself."

The danger of this mill work is appalling. Statistics of certain local unions in this city of mill hands are given (2456-57). Local Union No. 476 has 350 members. Wit ness Brown said that 300 of these members had been maimed or otherwise disfigured in the course of their employment in mills. Local Union No. 309 has about 1,450 members, of whom only between 300 and 400 are outside carpenters, the others being mill men. Between 300 and 400 had been injured in mills. Local Union No. 497 has only about 30 inside men, and yet over 25 of them have been injured in mills. With regard to Local Union No. 476 we have this further evidence (2385):

"Q. You cited an instance about taking a vote —would you mind repeating that? A. It was considered a standing joke in Local No. 476. Instead of saying, 'All in favor raise the right hand,' they would say, 'Stumps up.' What was left of the hands would go up."

GIST OF THE ACTION.

Stripped of its verbiage, so that it stands out bare in its exposed injustice, is the claim of the plaintiffs, in which they ask the Court, in effect:

(1). To compel these defendants to work on their non-union material, by indirectly enjoining their officers from finding out and telling them when material put before them is non-union, *that is to enjoin the agents rather than the principals;* (2) To compel them to so work on trim not made by their own members in order to put their own members in union mills out of work, disrupt the union mills, and so increase complainants' business, and make part of the members destroy the other part; (3) To compel the outside members to kill their own chances of getting work in union mills by destroying those union mills; (4) To compel the outside carpenters to put their inside carpenters out of work so they cannot pay dues to their organizations, sick, disability and funeral benefits, and so destroy their own association in the interest of these non-union forces; (5) To lower the low union standard of wages in mills and lengthen the hours of labor, and indirectly compel other mill owners in order to compete with them to hire women at nine cents an hour; and (6) to override all federal and state laws in their spirit and letter, which provide for payment of the prevailing rate of wages and eight hours a day on public work.

POINT I.

The plaintiff having asserted jurisdiction under a law of the United States and also upon the ground of diversity of citizenship, and having no standing in court under the Federal question raised, the judgment of the Circuit Court of Appeals is final on all the issues.

The only federal question presented in the bill of complaint (106-8) is whether defendants have violated the anti-trust law. Inasmuch as only the government may sue for injunction under that act, as we show in our next point, and injunction is the only relief sought herein, federal jurisdiction in the case rests entirely on diversity of citizenship. Such diversity of citizenship is alleged in the bill of complaint (105).

The Judiciary Act, Section 6, provides that the decrees of the Circuit Court of Appeals shall be final in all cases in which jurisdiction is dependent entirely upon diversity of citizenship of the parties, with exceptions which do not concern the case at bar.

> *Huguley Mfg. Co.* v. *Galeton Mills,* 187 U. S. 585;
> *Benjamin* v. *New Orleans,* 169 U. S. 161;

The appellants are in the same position owing to their having no standing in court to assert the federal question raised as they would be if they had asserted and not established a federal question. In cases where a federal question has been raised and not established, and jurisdiction was conferred by diversity of citizenship, it is held that the Supreme Court cannot pass on the other questions

involved in the case, the decree of the Circuit Court of Appeals being final.

Bankers' Mutual Co. v. *Minneapolis*, 192 U. S. 371;
Pope v. *Louisville Co.*, 173 U. S. 573;
Montana Min. Co. v. *St. Louis Min. Co.*, 204 U. S. 204;
Empire Slate Co. v. *Hanley*, 198 U. S. 292;
Bonin v. *Gulf Co.*, 198 U. S. 115.

POINT II.

The suit being for injunction only and not having been brought by the Government did not lie under the Anti-Trust Act, of July 2nd, 1890, and it is not resuscitated by the Clayton Act, of October 15th, 1914.

The action having been brought in equity for injunction and by private parties was not authorized by the Sherman Act. Such actions could only be brought by the government through the district attorneys with the approval of the Attorney General.

The respective civil remedies given the government and private parties are set forth in the following sections of the Anti-Trust Act, as they stood before the supplementary legislation of the Clayton Act;

> Sec. 4 (Jurisdiction of Courts—Duty of District Attorneys—Procedure—Hearing). The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations.

Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises (26 Stat. L. 209).

Sec. 7 (Damages to Persons Injured—Suits). Any person, who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States, in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee (26 Stat. L. 210).

In *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 72, reversing 123 Fed. 692, it was held that a State cannot maintain an action to enjoin under the act, and the same rule is referred to as applicable to individuals. The Court said:

"We can not suppose it was intended that the enforcement of the act should depend in any degree upon original suits in equity instituted by the states *or by individuals* to prevent violations of its provisions. On the contrary, taking all the sections of that act together, we think that its intention was to limit direct proceedings in equity to prevent and restrain such violations of the Anti-Trust Act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several states and with foreign nations, to those instituted in the name of the United States, under the fourth section of the Act, by district attorneys of the United States, acting under the direction of the attorney general;

thus securing the enforcement of the act, *so far as direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country.*"

The following cases also hold that only the United States could apply for injunctive relief under the Sherman act:

Blindell v. *Hogan*, 54 Fed. 40, affirmed 56 Fed. 696;
Greer Mills v. *Stroller*, 77 Fed. 1;
Gulf, C. & S. Ry. Co. v. *Miami S. S. Co.*, 86 Fed. 407;
Southern Exp. Co. v. *U. S. Express Co.*, 88 Fed. 659, affirmed 92 Fed. 1022;
Metcalf v. *Am. S. Co.*, 108 Fed. 909;
Nat. Fireproof Co. v. *Mason Builders*, 169 Fed. 259;
Paine v. *Neal* (case at bar), 190 Fed. 1020.

In the following cases, cited against our contention, the point was not raised or considered, but they contain *obiter* statements in favor of such jurisdiction:

U. S. v. *Addyston*, 85 Fed. 279;
Mannington v. *Hocking Valley*, 183 Fed. 140.

But appellants adroitly in their brief, Point XIII (p. 211), seek to make the so-called Clayton Act, approved October 15, 1914, and generally considered to be in the interests of organized labor, which fostered it, a boomerang which galvanizes into life this defunct action, improperly brought by a private party and to secure relief not accorded a private party by the Sherman Act itself.

Appellants' argument is substantially this: Assuming we had no right to bring the action, which was solely within the province of the government, and we brought it to obtain relief not given to private parties by the Sherman

Act, we are entitled to judgment now because several months after judgment was entered herein the Sherman Act was so supplemented by the Clayton Act that private parties were given the right to sue for injunction and in their own behalf; we had no right to sue as plaintiffs for injunction then and no right to that relief, but unless we are barred by limitation or otherwise, we may now sue under the Sherman Act with the Clayton Act supplements, for injunctive relief because of a condition of affairs in existence when the judgment was rendered, and to save us from doing so and to enable us to take advantage of our own wrong in bringing these defendants to Court when we had no right to do so, defendants' judgment should be made a judgment for plaintiffs.

We can find no authority for that position, and it does not seem to us that any of the cases cited under that point by appellants stand for this contention. The fact that the plaintiffs have put defendants to the expense of a long litigation without reason, should not permit them to not only take advantage of that wrong but to securing rights thereunder. Liability for many thousand dollars worth of costs would be cast upon defendants' shoulders, and so property might be taken without due process of law. Any claim defendants might have for needlessly bringing them into this long litigation would be obliterated, and, generally, liability even in the contract form of a judgment would be shifted from the shoulders of one party to that of another by the fiat of a statute.

The case of *Missouri T. R. Co.* v. *U. S.* (189 U. S. 274), cited by appellants (Appellants' Brief, 212), does not apply because the act referred to was by its terms made to apply to pending and undetermined litigation, as stated in the opinion of Mr. Justice WHITE, at 284:

> "We think the purpose of the latter provision was to cause the new remedies which the statute created to be applicable as far as possible to pending and undetermined proceedings, brought prior

to the passage of the Act, to enforce the provisions of the Act to regulate commerce."

If the new law above referred to purported to change the contractual effect of judgments, there seems to be no doubt it could not stand. No case goes to the point of holding that a new law can make a judgment in favor of defendants as in the case at bar a judgment in favor of plaintiffs, which plaintiffs here contend.

But if the Clayton Act could be appealed to for retroactive effect in this action it should be to prevent the Court from perpetually enjoining what are held to be lawful acts of labor organizations under the Clayton Act, even if they were unlawful acts under the original Anti-Trust Act; and so, further, to prevent the dissolution as a conspiracy of a labor organization which cannot be held to be an unlawful conspiracy in and of itself in restraint of interstate trade under the Clayton Act.

CLAYTON ACT DOES NOT APPLY.

Discussion as to whether the Clayton Act may be invoked by plaintiffs as a subsequent statute to the Anti-Trust Act and as subsequent to the judgment herein, seems to be academic because of the wording of the Clayton Act itself—which, far from authorizing—actually forbids such injunctions against labor organizations as is herein demanded.

There can be no doubt that the general impression has been that the Clayton Act was primarily intended to help labor organizations and that it was largely due to them that the bill was passed. Yet appellants take the position that the Sherman Law was not changed in this regard by the Clayton Act. In their brief (216) they quote from the Senate Judiciary Committee report and its reference to the report of the House Committee, to the effect that it was not intended to amend but to supplement the

Sherman Act, and that the Clayton Act leaves "the law of conspiracy untouched." These reports might throw light on what these committees thought Congress meant when it passed the Clayton Act, assuming the House Committee knew what "the law of conspiracy" theretofore was, in which case—aside from such phases of that law as have been passed upon by this Court—their wisdom in the chaos of decisions would be marked. In the same sense why may we not also look to the intent of the President of the United States in signing the measure. The President gave the pen with which he signed the Act, according to public report, to Samuel Gompers, a noted champion of labor. He must have assumed that labor was getting some advantage by the provisions of this Act. What can be pointed out as supplementary advantage to labor, except the inhibition against holding the ordinary activities of labor as subject of suit or prosecution under the Act? The Act was generally considered as epochal legislation for labor, and the opening words of Section 6, have been quoted as a declaration for labor. They read:

> "That the labor of a human being is not a commodity or article of commerce."

Those forcible words could not have been put in the Act just for their rhetoric. We do not know of a case where this Court has held that human labor is a commodity or article of commerce. The words were probably incorporated into the Act because of the contention in *International Harvester Co.* v. *State of Missouri* (234 U. S. 199), that a state statute of Missouri prohibiting combinations denied equal protection of the laws because it embraced vendors of commodities and not vendors of labor. This Court held there was a reasonable basis for the classification, and might be expected to so hold as to the provisions referred to of the Clayton Act. We do know of many cases in the different States where human labor has not

been accorded the rights of an article of trade. For instance, such a line of cases as these: Where the rights of men collectively to refuse to work without malice—which we may here call the good will of labor—conflicts with the good will of a business to sell articles of merchandise, labor has had not only to give way to the free passage and sale of the thing to be sold, but, as is asked in the case at bar, labor has indirectly been required to go to work to prevent any impediment in the sale of the manufactured products of the antagonists of labor. We regard the cases on page 168 of Appellants' Brief of this character. They are:

Purvis v. *Local 500*, 214 Pa. State 348 (63 Atl. 585);
Shine v. *Fox Bros. Mfg. Co.*, 156 Fed. 357 (C. C. A.);
Huttig Sash & Door Co. v. *Fuelle*, 143 Fed. 363;
Lohse Patent Door Co. v. *Fuelle*, 114 S. W. 1001 (Mo.);
Booth v. *Burgess*, 65 Atl. Rep. 226 (N. J.);
Irving v. *Joint District Council*, 180 Fed. 896.

Then again, we may say, that generally throughout the States, with exceptions however, union men may refuse to work with non-union men, but there is deep confusion among the cases as to whether union men may refuse to work with, handle and install non-union things, such, for example, as in the case at bar, the newel posts of stairways (instead of men) as is shown by the cases just cited, and others we will cite.

Examining Section 6 of the Clayton Act, which purports to exempt labor unions in certain activities from the operation of the Act, and Sections 16 and 20, which confer, limit and define, the jurisdiction of the Courts under the Act, we get the impression that while it may be that it was not intended to disturb prior rulings of this Court

as to the position of labor under the Act, as appellants contend, that it was intended to put at rest a number of disputed questions as to the rights of labor and set certain marks of limitation for future rulings under the Act. The contention of appellants (Appellants' Brief, 216) that because the Clayton Act in Section 4 repeats the words of Section 7 of the Sherman Act, that Congress has adopted the doctrines of the Loewe case (*Loewe* v. *Lawlor*, 208 U. S. 274), goes farther than we would care to go with them. Without intending to detract from the achievements of the lawyers who are the same in both cases, we submit that the reading of the section indicates the proposition is far-fetched:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Concession that this re-enactment "was an adoption by Congress of the doctrines" of the Loewe case, could avail the appellants little, if our position is correct, that the cases are very different. We urge that the case at bar is intended to go beyond the principles of the Loewe case (which only curbed certain of the activities of labor), so as to strike directly at the vitals of its organization. In the Loewe case, labor was prohibited from doing acts inspired by malice to injure a business. In the case at bar, it is asked that men be driven to work, to the undoing of themselves and their fellow members in the mills—men who are acting on principle without malice and having the injury of no one in view, but looking solely to their own benefit and that of their fellows. *In the Loewe case, action of labor was complained of; in the case at bar, the complaint is*

inaction of labor. The Courts which stopped the action in the one case, to protect the good will of a business, is asked on entirely different facts, with different motives and methods, to compel labor to protect inimical business by going to work to its own undoing.

Let us see what changes in the law, if any, are suggested by the Clayton Act from its own wording. Section 6 reads:

> "That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; *nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.*"

It would seem as if the above words, which we have italicized, were put in the Act to meet such cases as those at bar. At the basis of unionism must be the principle that the members shall only work with union men and under union conditions. There is nothing in the record in this case to indicate any intention to injure any one. It is the organization—the declaration of this principle—on which this conspiracy is alleged to rest. In other words, it is asked that the organization itself and of itself for its impersonal declarations and acts be considered a conspiracy in restraint of trade. Such an assumption is forbidden by the above italicized words of the Act. The question arises, does this work a change in the Sherman Act. If the Sherman Act authorized suit where there was no special injury and where the alleged conspiracy was not directed against any one, the Clayton Act would make the change in the law that no suit or prosecution could be had

because of any injury to trade that should arise through the organization of such a labor union as is described in Section 6.

As a labor organization, described in Section 6, is not a violation of the anti-trust laws, private parties such as complainants, would have no right to sue for injunction under Section 16 of the Clayton Act, which reads:

> "That any person, firm, corporation or association shall be entitled to sue for and have injunctive relief in any court of the United States having jurisdiction over the parties against threatened loss or damage *by a violation of the anti-trust laws*, including sections two, three, seven and eight of this Act, *when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings.*"

Sections 2, 3, 7 and 8 do not refer to labor unions. Complainants would have no right to sue for injunction under the italicized words, because "under the rules governing such proceedings" in equity, so far as we know, injunction is not granted where there is no special damages and because of impersonal action in business affairs.

But Section 20 of the Clayton Act is the most important section as showing the intent of the Act with regard to labor. The wording of this section is a departure from legislation conferring jurisdiction on courts. *It is in fact, especially in its second paragraph, an injunction order of Congress prohibiting, rather than conferring, the exercise of jurisdiction by the District Courts in certain injunction disputes regarding labor.* And the wording of the second paragraph indicates a purpose to set at rest conflicting decisions through the states as to the rights of labor under certain heads. Section 20 reads:

> "That no restraining order or injunction shall be granted by any court of the United States or a

judge or judges thereof in any case between an employer and employees, or between employers and employees, or between employees or between persons employed and persons seeking employment, involving, or growing out of, *a dispute concerning terms or conditions of employment,* unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"*And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising or persuading others, by peaceful means, so to do; or from attending at any place where any such person or persons may lawfully be for the purpose of peaceably obtaining or communicating information, or from peaceably persuading any person to work or to abstain from working, or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner and for lawful purpose, or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*"

The second paragraph might well be considered a sort of bill of rights of labor. The first paragraph indicates that the inhibitions contained in the section are not made to apply to the Clayton Act only but to any actions "between employers and employees, or between employees;

or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment unless necessary to prevent irreparable injury," etc. But even in cases to prevent irreparable injury, such injunction shall not prohibit the acts set forth in this notable second paragraph of the Act.

To prevent the wreck of Appellants' contention (that they could sue under the Clayton Act) on the rocks of Section 20, Appellants take the narrow position that Section 20 is limited to actions between employers and employees, etc. (Appellant's brief, 218). That is, they want the court to enjoin labor at their instance as outside third parties who want to sell goods, in ways that the Act prohibits employers or employees from enjoining each other. But complainants stand in the shoes of the employers of carpenters to whom they sell wood work. They are ostensibly seeking to compel carpenters to work for these employers of carpenters so they can sell their wood work to them. Section 20 must apply to such an action. If the master carpenter can not enjoin his workmen it can not be that the man who sells wood work to that master carpenter can enjoin the workmen. Conditions of employment are involved because the grievance of the workmen is against an employer giving them non-union material, the same as if he gave them a non-union man to work with.

Let us separate the clauses of the second paragraph of Section 20, starting with:

> *"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, from ceasing to perform any work or labor."*

That is clearly a declaration that workmen may strike collectively and employers lock them out collectively, and

at will. That assertion does much to clear the legal air of uncertainty.

Next follows:

> "Or from recommending, advising or persuading others by peaceful means so to do;"

Many decisions through the country are clarified or brushed away by that clause.

Then follows:

> "Or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; *or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value;*"

After conferring further immunity on labor the section ends by the direct declaration that the above acts shall not be considered as violating any federal law, as follows:

> "Nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

The activities of defendants are certainly more than covered by the above specifications of Section 20, and how in view of this last quoted clause can they be enjoined under any law of the United States, since the passage of the Clayton Act.

Yet plaintiffs contend the Clayton Act has made no change in the law. It makes a most sweeping change, we submit, in freeing the many branches of labor activities,

set forth in Section 20, from interference by injunction, not only under the Anti-Trust Law as amended by the Clayton Act, but with regard to all other laws of the United States. It requires, as we understand it, that Section 20 be taken into consideration in drawing all injunction orders or decrees regarding the activities of labor organizations of a peaceful character.

The Clayton Act can in no way assist the cause of plaintiffs in the case at bar. If the reasoning on which plaintiffs invoke it as retroactive legislation to aid their case is good, by a parity of reasoning injunction should fail herein because even if allowed to plaintiffs under the Sherman Law it is prohibited on such a state of facts as are herein disclosed against this carpenters' union by the Clayton Act.

The point of Appellants that while labor might be immune of itself from the Clayton Act (Appellants' brief, 219), it would lose this immunity where it conspired with others to interfere with trade, is best answered by saying there are no facts herein from which to draw the conclusion. The word conspiracy is thrown, as it often is in these cases, without rhyme or reason, over the acts of the defendants. Plaintiffs have shown no conspiracy against these complainants. They admit in their brief (Appellants' brief, 99) that the actions of the defendants is impersonal. There can be no impersonal conspiracy, so far as the common law is concerned, and there are no facts herein warranting the use of the word conspiracy in connection with any acts which might have even a remote bearing on interstate trade. The master carpenters, defendants, want to employ the union men and buy union wood work for them to install. The union men want to work under these conditions. These third party complainants want to disturb this relation, because in the renewal of the chaos of 1903 in the building trades they may perchance induce the master carpenters defendants to buy

their goods. If labor is immune in such lawful activities, as are disclosed in this case from suit under the Clayton Act, it has not lost that immunity by any relations here disclosed with the other defendants.

POINT III.

The Acts charged could have only an indirect and remote effect on interstate commerce, if any, and so are not violative of the Anti-Trust Law, as it stood before and after the Clayton Act.

If the utopian surmisings and reports of different officers of the United Brotherhood of Carpenters that the mills of the world would in time be manned by union men—which reports plaintiffs have conned and elaborated in the evidence—without submitting a particle of evidence outside of a part of the City of New York to indicate there was any basis in present conditions for these sanguine predictions—were given their face value and such unionizing was in the power of the union men and was probable, imminent or menacing, sufficient grounds are not afforded under the authorities for the assertion that the Act has been violated. We would in furtherance of this millenium of unionization assume that this interstate union of craftsmen, refuse to work on mill products not made by their own members through the states—nor to get the so-called control of the mill industry into the hands of their present membership and so bar out other mill men—but in order to increase their membership, with the altruistic idea of spreading the benefits of shorter hours and higher wages among other men. Plaintiffs' position as to what the purpose of these defendants is does not seem to be clear. As they offered evidence to show that some unidentified men had tried to unionize the mills of some of the plaintiffs

(1886, 1761), which would have the usual meaning of making union men of the workmen in these mills and so increasing the membership of the unions. The complaint says (36) that defendants have conspired to prevent other persons than their own members from exercising the trade of carpenters. Appellants' brief calls the union "a private society" and explains alleged difficulties of becoming a member.

The diverse positions take by appellants on this head are therefore:

1. These defendants are seeking to unionize all mills, and so increase their membership;

2. These defendants are trying to get all mill work for their present members and endeavoring by stringent rules to limit their membership. There are other allegations to the effect that these defendants are seeking to hurt the trade of the non-union mill men, so they can get a so-called monopoly in the trade of mill work. It is necessary for us, therefore, to consider whether under the first section of the Act these defendants have conspired with intent to create a monopoly forbidden by the Act or have taken measures to interfere with interstate trade prohibited by the Act.

If these defendants had "control" of the work in the mills of the country they would not have a monopoly such as the Act forbids. They are mere employees who furnish work, which, along with material, goes to produce the manufactured articles, the control of which is in the owner of the mill. There can be no monopoly of labor. These craftsmen do not fix the prices of the articles they make, nor have they any say as to the amount of the output of the mill. They have nothing to do with where the articles made are sold, their transportation or any of the terms of sale. It is not within their power to create an unlawful monopoly, and if they had all the mills of the

world unionized it could not be said they had violated the Act, as we shall show by the authorities.

What is the most unlawful thing they do, may be asked on the second postulate, to interfere with interstate trade? The only thing of moment they do is to refuse to work when a non-union article of mill work is put before them. They do not interfere with the employer. He is left free to get other carpenters to do his work. It was not shown that in any part of the country, not even in New York City, that there is not sufficient non-union carpenters to erect all the non-union material required to be erected. Instances are recorded (all at the City of New York) where master carpenters have been informed in advance that the union carpenters will not work on any non-union material put before them. If they have a right to refuse to work, they have the right to say in advance they will so refuse; in fact, it is a duty they owe to a man about to employ them, if they think he is going to set non-union material before them. They do not say they will not work on the mill products of John Doe or Henry Hoe. The announcement (and it is only in part of the City of New York that they are strong enough to make the announcement) is that they will not work on any non-union mill products. We contend that these acts come under the authorities which we will refer to, which state that the Act does not apply where the effect of the actions of defendants is indefinite and remote with regard to interstate trade.

We make the same statement with regard to the relations between the labor people and the other defendants. No injunction is asked in the complaint against the Master Carpenters' Association, party to Exhibit "B," but it is asked to compel these mechanics to work on whatever they may buy, so that perchance thereby the trade of the complainants may be increased. The effect of such a combination is so remote and indirect on the sale of merchandise

that it does not call for action by the Courts, nor is there any certainty that by compelling these men to work the sales of the complainants' mill work would be increased. The Master Carpenters, defendants, all of the City of New York, deny in their answer that they are coerced into buying union goods and say that Exhibit "B" was the result of mutual concessions of the parties.

Plaintiffs' further contention that these defendants' conspiracy is in part to prevent non-union carpenters from getting work would also show indirectness of the effect of a refusal to work on trade in mill work. Appellants' brief says (8):

> "Since 1904, this private society has been engaged in a national campaign with varying force and success in different communities to bring about a condition where none but union men will be employed in the erection or manufacture of wood materials, and where no materials shall be sold in commerce except union materials which are produced by employers who employ their members exclusively."

It does not appear that the complainants are acting for any carpenters who cannot get work and they would probably have no standing in court on the horns of the dilemma of seeking to crush labor and to help it. But the Act does not provide for free trade in labor, and these statements of appellants' brief, made again at greater length at page 5, are probably irrelevant so far as the Sherman Law is involved, although set forth in the complaint, Section 25 (36) as violations of the Sherman Law. That is, they would be clearly irrelevant unless the prevention of other carpenters getting work was in order to hamper the sale of something that is traded in—which is not alleged. How apparent then would be the remoteness of the effect on trade? Union carpenters refuse to work with non-union carpenters because thereby a builder may perchance buy union materials.

The way the injunction would work out shows the remoteness of any injury by these defendants' acts. In whatever way it may be worded, the effect of the injunction would be to compel these defendants to work on plaintiffs' woodwork when presented to them on a building. As the woodwork is not in such shape as to be installed in a building, the manufacturing done at the mill must be supplemented by the work of fitting and installing in buildings. So by compelling the mechanics on a building to work on goods already sold to the builder, usually by jobbers, complainants expect that the builder will buy the same sort of goods for the next building he erects. The refusal to work follows the sale. Indirectly, the outside carpenter would be compelled by injunction to bring about his own undoing, cutting himself off from employment in union mills when he cannot get outside work, as in winter, and imperilling the employment of his fellow members in mills—by compelling him to work on non-union material for the indirect effect upon the sales of the non-union mill work of plaintiffs the work of this outside carpenter might afford.

The case of *United States* v. *E. C. Knight*, 156 U. S. 1, involved the validity under the Sherman law of an agreement by which the American Sugar Refining Company took over four manufactories in Philadelphia, which gave it a monopoly in this country in the manufacture of sugar. The Court said, at 12:

> "Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense, and although the exercise of that power may result in bringing the operation into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture and is not a part of it."

Justice PECKHAM in *U. S.* v. *Addyston Pipe & S. Co.*, 175 U. S. 211, 240, said of the Knight case:

> "The direct purpose of the combination in the Knight case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce."

Still assuming there was proof, aside from chimerical statements of officers of hopes of general unionizing mills —outside of a part of the City of New York—and a general refusal to work on buildings on non-union mill work, would these conditions not refer only to the manufacture, as in the Knight case, and any effect they might have on trade be but incidental and remote. The mill work is only partly made in mills. The manufacture must be continued at the building where the manufacture begun at the mills is completed.

In *Hopkins* v. *United States*, 171 U. S. 578, a stockyards association located at Kansas City adopted by-laws which created an illegal combination at common law as the Court found, but it was held that these regulations did not constitute interstate commerce, although the association sent agents into other states soliciting the shipment of cattle, hogs and sheep to it for disposal, and millions of such animals were shipped to it from other states, and although such by-laws were injurious and detrimental to the owners of such animals. The stockyards were part in Kansas and part in Missouri. The Court said at 590:

> "The selling of an article at its destination, which has been sent from another state, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount

to be charged for such service is not, therefore, a combination in restraint of that trade or commerce. Granting that the cattle themselves, because coming from another state, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade. The commission agent in selling the cattle for their owner simply aids in finding a market; but the facilities thus afforded the owner by the agent are not of such a nature as to thereby make their agent an individual engaged in interstate commerce, nor is his agreement with others engaged in the same business, as to the terms upon which they would provide these facilities, rendered void as a contract in restraint of that commerce. Even all agreements among buyers of cattle from other states are not necessarily a violation of the act, although such agreements may undoubtedly affect that commerce.

"The charges of the agent on account of his services are nothing more than charges for aids or facilities furnished the owner whereby his object may be the more easily and readily accomplished. Charges for the transportation of cattle between different states are charges for doing something which is one of the forms of and which itself constitutes interstate trade or commerce, while charges for doing something which is one of the forms of and which itself constitutes interstate trade or commerce, while charges or commissions based upon services performed for the owner in effecting the sale of the cattle are not directly connected with, as forming part of, interstate commerce, although the cattle may have come from another state. Charges for services of this nature do not immediately touch or act upon nor do they directly affect the subject of the transportation. Indirectly and as an incident, they may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by a purchaser, but they

> are not charges which are directly laid upon the article in the course of transportation, and which are charges upon the commerce itself; they are charges for the facilities given or provided the owner in the course of the movement from the home situs of the article to the place and point where it is sold."

Charges for facilities furnished, as stated in the Knight case, have been held not a regulation of commerce, even when made for services rendered or as compensation for benefits conferred. To the same effect are:

> *Sands* v. *Manistee R. I. Co.*, 123 U. S. 288;
> *Monongahela N. Co.* v. *United States*, 148 U. S. 312;
> *Kentucky & Indiana B. Co.* v. *Louisville, etc., R. Co.*, 37 Fed. 567.

In the case of *Addyston Pipe and Steel Co.* v. *United States*, 175 U. S. 211, the defendants entered upon an agreement for the manufacture *and sale* of cast iron pipe among thirty-six states, to enhance the price of the pipe. Justice PECKHAM said, 228:

> "Under grant of this power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the *natural and direct* effect of such contract will be, when carried out, to *directly, and not as a mere incident to other and innocent purposes* regulate to any *substantial extent* interstate commerce."

> "The test under that act of the legality of a combination or conspiracy is its direct and necessary effect upon such competition. If its necessary effect is but incidentally or indirectly to restrict competition, while its chief result is to foster the trade and increase the business of those who make and operate it, it is not a violative of this law. But if its necessary effect is to stifle, or directly and

> substantially to restrict, free competition in commerce among the states or with foreign nations, it is a combination or conspiracy in restraint of that trade, and it falls under the ban of that act."

United States v. *Standard Oil Co.*, 173 Fed. 177; affirmed 221 U. S. 1:

> "It does not denounce every combination which restrains that commerce, but those combinations only the necessary effect of which is to stifle, or *directly and substantially* to restrict, free competition in that commerce. If the necessary effect of a combination to engage in or conduct interstate or international commerce is but *incidentally and indirectly* to restrict competition therein, while the chief result is to foster the trade and to increase the business of those who make and operate it, it does not fall under the ban of this law."

The case of *Loewe* v. *Lawlor*, 208 U. S. 274, on which complainants seem to largely rely, rested on allegations of *direct* effect on the sales of complainant's hats, by activities running through different states, and with a motive to injure the particular plaintiffs. The action was at law to recover three-fold damages and came before this Court on a demurrer to the complaint. The complaint was brimful of acts of parties seeking to directly injure a trade and without any direct benefit to themselves in view, including those covered by the following allegations of the complaint:

> "To cause by threats and coercion, and without warning or information to the plaintiffs, the concerted and simultaneous withdrawal of all the makers and finishers of hats then working for them, who were not members of their said combination."
>
> "To declare a boycott against and boycott the hats of plaintiffs offered for sale in all States, and to boycott the business of all persons who should buy them.

> "To threaten with a boycott those customers who should buy any goods whatever, *even though union made,* of such boycotted dealers.
>
> "And at the same time to notify such wholesale dealers that they were *at liberty to deal in the hats of any other non-union manufacturer* of similar quality to those made by the plaintiffs, but must not deal in the hats made by the plaintiffs under threats of such boycotting; to falsely represent to said wholesale dealers and their customers, that the plaintiffs had discriminated against the union men in their employ, had thrown them out of employment because they refused to give up their union cards and teach boys, who were intended to take their places."

Among the many other allegations, necessarily admitted for the purposes of the demurrer, were that boycotting notices were published in the daily press in different states announcing the boycott not only against the complainants but against all dealers who bought their hats.

Regarding the allegations of the complaint Chief Justice FULLER said:

> "The averments here are that there was an existing interstate traffic between plaintiffs and citizens of other states, and that for the *direct* purpose of destroying such interstate traffic defendants combined not merely to prevent plaintiffs from manufacturing articles then and there intended for transportation beyond the State, but also to prevent the vendees from reselling the hats which they had imported from Connecticut, or from further negotiating with plaintiffs for the purchase and transportation of such hats from Connecticut to the various places of destination."

Differing from a number of other cases the Loewe case, showed that the motive and intention of the parties are paramount considerations, Chief Justice FULLER saying:

> "We do not pause to comment on cases such as *United States* v. *Knight,* 156 U. S. 1; *Hopkins* v.

> *United States,* 171 U. S. 578; and *Anderson* v. *United States, id.* 604; in which the undisputed facts showed that the purpose of the agreement was not to obstruct or restrain interstate commerce. *The object and intention of the combination determined its legality.*"

In *Reading Co.* v. *United States,* 226 U. S. 324, the Court said:

> "Whether a particular act, contract or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby, secured over the commerce affected, as well as by the method which was used. Of course, if the necessary result was to restrain trade between the States, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important."

Aside from the distinction that the case at bar shows merely a declaration of a principle against working on non-union mill work in general, and having no motive or intention to injure anyone, we have a high class of motives looking to the benefit of the members refusing to install non-union mill work in maintaining their own members at work in union mills with union wages and keeping such mills open for themselves to work in when outside work is slack and they are so partly incapacitated as to be unable to stand the more strenuous outside work. Any effect on the plaintiffs' sales is not a direct motive of this union, called a conspiracy.

Nor was the Loewe case like the case at bar, to compel men to exercise their trade, defined in the Century Dictionary, as:

> "The craft or business which a person has learned and which he carries on as a means of livelihood."

If the labor union had been shown to have done anything outside of the City of New York affecting the complainants' business, or it appeared imminent or "menacing" that it would do so and could do so, we doubt that it would be within the intent of the Anti-Trust law that men should be compelled to exercise their craft to benefit the sale of products objectionable to them and to the undoing of themselves and their fellow members in mills.

> "An attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the States, violates the second section of the Act. But an attempt to monopolize a part of interstate commerce which promotes, or but indirectly or incidentally restricts, competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made, and was not made, illegal by the second section of the act under consideration, *because such attempts are indispensable to the existence of any competition in commerce among the states.*"

Promotion of the sales of the woodwork of union mills, as well as increase of work and the means of work to their members, if they resulted from the acts charged against the defendants, within the language of the last cited case, would lead to increased competition, rather than to restrict it.

Cannot craftsmen agree to sell without malice their labor where they please regardless of what effect it may have on others or on the sale of their goods?

If their craft was a tangible thing like tobacco they would have wide control over it, regardless of the effect on other dealers in tobacco, under the case of *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454.

Plaintiff was a jobber in tobacco, and defendant controlled most of the leading brands of plug and chewing

tobaccos. Defendant compelled jobbers to buy at fixed periods and at high fixed prices more than they could sell and required them not to buy goods of other manufacturers. If they bought goods from other manufacturers the defendant would not take back the surplus unsold goods at these fixed periods. Plaintiff bought from other manufacturers. In holding there was no violation of the Anti-Trust Act, Judge SANBORN said:

> "The tobacco company and its employee fixed the prices of its commodities so high that the plaintiff could not profitably buy them. This was no restriction upon free competition, because it left the rivals of the company free to sell their competing commodities at any price which they elected to charge for them. It would have been no violation of the law under consideration if the tobacco company and its employee had combined to refuse to sell any of its commodities at any price, and to retire from the business in which they were engaged entirely. Much less could it be a violation of the Act for them to fix their prices too high for profitable investment by the plaintiff."

These craftsmen should be accorded at least the same right to refuse work when they were not offered the terms and conditions they impose, at least if it did not have a direct effect on commerce.

> "An agreement between a number of dealers and manufacturers to raise prices, unless they practically controlled the entire commodity, cannot operate as a restraint upon trade, nor does it tend to injuriously affect the public. Unless the agreement involves an absorption of the entire traffic in lumber, and is entered into for the purpose of obtaining the entire control of it with the object of extortion, it is not objectionable to the statute, in my opinion. Competition is not stifled by such an agreement, and other dealers would soon force the parties to the agreement to sell at the market price, or at a reasonable price, at least."

Put in the place of the price of the labor the terms and conditions which these craftsmen insist upon and the reasoning would run in a similar way in the case at bar.

Nor does it seem that what we may call the railroad cases should stand in the way of our contention such as:

In re Debs, 158 U. S. 564;
Thomas v. *Cincinnati N. & T. Co.*, 62 Fed. 803;
United States v. *Cassidy*, 67 Fed. 698.

Taking the first for example, and ignoring the acts of violence which pervaded it, it involved the simultaneous strike of the employees of an interstate railroad, which stopped the road and indirectly interfered with the transportation of articles of commerce. The strike was sympathetic and was taken because of a strike of the makers of Pullman cars used on this railroad. There is no comparison between that case as to directness of effect and intent and the case at bar with its proof of only seven isolated strikes over a period of about eight years and all at the City of New York.

In the railroad cases a commanding power of officers to order the men to act was shown, and injunction acted against these officers. In the case at bar at the City of New York where the only seven strikes occurred, the men quit voluntarily. The adoption of the trim amendment to the constitution in 1904 *recommending* that the members refrain from work on non-union mill products, indicates their volition without coercion of officers. In the Danbury Hatters' case, orders emanated from bodies of officers not to buy and to boycott. While many men would resent such orders, far more would resent orders to compel them to work or desist from working. The right to purchase where they please would be on a line with the constitutional right of "liberty and the pursuit of happiness," but it would not have the emphasis in the human mind that enforced labor would have. We believe strikes as to common carriers should be governed by different laws than

economic disputes in trade, which do not paralyze the channels of trade. But injunctions in the railroad cases on evidence of authority of agents to compel the sympathetic strike, would not apply to the case at bar, as stated, and for the reason this is not a sympathetic strike. Nor are we clear on the point that a court can enjoin an agent when it cannot mandatorily enjoin the principle to work.

The *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600, is very different from the case at bar. In order to keep the lumber trade among the retail dealers in different states, a list was circulated of cases where wholesalers had sold direct to customers of the retailers, so that the retailers would refuse to patronize such wholesalers. In that case we have a direct effort to injure specified individuals by withholding trade. There was no unfair lists circulated among the states in the case at bar. There was an unfair list of firms, that is firms not manned by the union—a list conceded to have been abandoned in 1907—given at the City of New York to the Master Carpenters' Association at their request, and fair lists, that is lists of union mills were circulated at the City of New York, but not elsewhere. But these could only indirectly affect sales of goods, for they were none other than a notice that certain men would not work on certain goods, but purchasers were free to get other persons to erect them.

With the total absence in this case of the number of non-union carpenters in the country, or proof of inability to get non-union carpenters, it cannot be said that a refusal to work on non-union trim, would or could have, direct or indirect, any effect whatever upon the sales of plaintiffs' woodwork. In fact, if plaintiffs sell for less than union mill owners and through the country there are plenty of non-union carpenters to install their woodwork, the tendency would be to increase the sales of the cheaper woodwork.

As there is a total lack of evidence of the effect of the alleged conspiracy outside of the City of New York, it is but fair to assume that the business of complainants has not been reduced and may have been increased during the ten years it is claimed this conspiracy has proceeded.

The local incidents affecting part of New York City are not within the scope of the Act.

As the evidence centers in New York City and the agreements, Exhibits "A," "B" and "C" of the complaint cover only such part of the business of the parties to them in that City, the alleged conspiracy is not interstate. The main objection seems to be to that part of Exhibit "B," as stated, (83) which reads:

> "There shall be no restriction against the use of any manufactured material except non-union or prison made."

The agreement is made between the Joint District Council of carpenters' unions of the City of New York and the Master Carpenters' Association of about one hundred builders. There are about 2,500 builders in the City but the 100 members are the largest builders. In effect the agreement would leave the union men free to strike, if they desired, against non-union material put before them by the Master Carpenters. If this induces the Master Carpenters to buy only union material, the effect is not certain and direct and could only affect incidentally business of other states.

It would seem to be in line with the ruling in the *Penn. Sugar Refining Co.* v. *Am. Sugar Refining Co.*, 166 Fed. 254, that if a contract in restraint of trade only affects products within the limits of a State it is subject only to state laws, any remote or incidental effect on interstate commerce being insufficient to bring it within the federal law.

Exhibit "B" states its purpose to be to ensure a peaceable adjustment of differences in the trade (81), and even if it had a collateral purpose to limit the sale or placing before the craftsmen of non-union goods, it would not be unlawful, when measured by the rulings in:

Camors v. *McConnell*, 140 Fed. 412, aff'd 140 Fed. 987;

Hadley Dean Plate Co. v. *Highland Glass Co.* (C. C. A), 143 Fed. 242;

Northwestern Consol. Milling Co. v. *Cullam*, 177 Fed. 786.

Again referring to *Hopkins* v. *U. S.*, 171 U. S. 578, we have the ruling of Judge PECKHAM at page 592:

> "To test as condemned by the act all agreements under which, as a result the cost of conducting an interstate business may be increased, would enlarge the application of the Act far beyond the fair meaning of the language used. There must be *direct* and *immediate* effect upon interstate commerce in order to come within the Act."

The restraint in the case at bar would have to be by the so-called labor conspirators on their fellow defendants, the Master Carpenters, who buy the goods. The answers of the master carpenters deny the charges of coercion, and Mr. Eidlitz, the large builder defendant, stated this agreement was the result of mutual concessions. The evidence shows a sort of local option of about one hundred builders to put before their workmen only union material for installation.

If there were any restraint here, aside from it being indirect, it could hardly be the *undue and unreasonable* restraint, which is marked out for prohibition under the rulings in *Standard Oil Co.* v. *United States*, 221 U. S. 1, where Chief Justice WHITE said:

> "It is obvious that judgment must in every case be called into play in order to determine whether

> a particular act is embraced within the statutory classes and whether, if the act is within such classes, its nature or effect causes it to be a restraint of trade within the intendment of the Act."

Nor will the courts interfere under the Act where the restraint of interstate trade is not of moment.

Interference, if any, with interstate commerce contemplated by the sale of river craft, which permitted a suspension of payment of installments of the purchase price in case of serious competition over a route between two named Ohio ports on a river, and required vendors to withdraw from such competition for five years, was held to be insignificant to render the contract invalid as imposing restraint on interstate commerce.

Cincinnati Co. v. *Bay*, 200 U. S. 179.

By the decision in *Union Pac. Coal Co.* v. *United States* (C. C. A.), 173 Fed. 737, it was held the company was not prevented by the Anti-Trust Act from refusing to sell its coal, from selecting its customers, from fixing the price and terms on which it will sell its other products, or from selling to different customers for different prices.

The same rights should be accorded to these defendants in selling their labor.

There is no discrimination against complainants. Complainants can have through their customers the labor of these defendants on defendants' terms. The master carpenters defendants are satisfied to have that labor on the terms of the union. The plaintiffs want to dictate their terms to both.

In *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, relief under the Act was denied because the injury alleged by the State was not direct nor special, but only remote and indirect, such an injury as would come alike, although in different degrees to every individual owner of property

in a state by reason of the suppression in violation of this Act, of free competition between interstate carriers engaged in business in that State; not such a direct, actual injury as that provided for in the seventh section of the statute.

The free interstate sale of labor is not protected by the Act.

The section of the bill which alleges a violation of the Anti-Trust Law (36) says that for many years these defendants have been engaged in a scheme

> "To prevent the pursuit or exercise of the trade of carpentry by any person in any State of the United States who is not a member of the United Brotherhood, and one of its subordinate bodies, and contrary to the laws of Congress of July 2, 1890, relating thereto, and the laws of the State of New York, to prevent and restrain each of your orators and all other employers of any carpenters not belonging to said Brotherhood, from engaging in interstate trade or commerce to sell or supply goods for sale, delivery, use and installation," etc.

The roundabout way in which the restraint on sales of goods is to be affected is manifest. The Act is designed to only protect the sale of things, such as are sold in trade, and not labor. So far as the Act is concerned these defendants would have the right through the States to prevent the sale of this labor by any carpenters but themselves. The argument that beyond this effort to prevent the sale of labor is the ulterior purpose to prevent the sale of goods is far-fetched, and does not ring true to the facts. It is generally understood that union men refrain from working with non-union men as a fundamental necessity to their labor organization, and probably with greater insistence than working with or on non-union things. As previously referred to:

The Act would not be offended in its first section if these defendants had secured a monopoly of making the woodwork in all mills for the same reason that the Act does not cover labor.

Referring apparently to the combination at the City of New York, appellants' brief in Point I, covering the Anti-Trust Laws, says (65):

> "It is a combination between the sources of production and those who control distribution and consumption, to limit the market to producers joining such combination."

We do not see anything unlawful in such a combination under the Anti-Trust Law or the common law. The master carpenters have the right to buy their goods where they please and pay more for them than the plaintiffs charge for similar goods. The master carpenters should be considered the only sufferers, but they do not cry out. They are defending the case and the exercise of the right to contract at will and buy what and where they please. If they were coerced, it would be for them to complain. They evidently obtained consideration for the trim clause of the agreement, which agreement, as stated, was the result of mutual concessions, and this is a case of third parties seeking to take away the concession of labor, which would leave the master carpenters with the consideration which the union paid for the concession, asked to be avoided by these third parties. But complainants say the agreement (Exhibit B) would stand with the trim clause omitted if injunction issued. If it did, nevertheless, the excision would make it unilateral.

POINT IV.

The United Brotherhood of Carpenters is not an unlawful conspiracy as an organization.

Combination in labor law is not synonymous with conspiracy. From such cases as *People* v. *Trequier*, 1 Wheeler Cr. Cases, 142, year 1823, which held that a labor organization to secure fixed wages was of itself an unlawful conspiracy the labor law has been gradually evolving. The date of a decision, so far as the many conflicting decisions through the states are concerned, is an all important consideration to determine its value, and the vintages of decisions, if we may call them such, lose force with their years, while decisions on other subjects ripen with age.

All the text books, we are familiar with in labor cases, put the dates after decisions. That is not done with regard to decisions in other branches of law. See, for instance, the list of cases at the beginning of Groat's "Attitude of American Courts in Labor Cases"; Martin's "The Modern Law of Labor Unions," chap. 2; Cooke's "Combinations, Monopolies, Labor Unions," table of cases; and Laidlaw's "Boycotts and the Labor Struggle," appendix of cases, pp. 564-471. Perhaps the dates should follow most of the cases in labor briefs. It cannot be amiss, at any rate, at times to point to the age of a decision.

This evolution has necessarily come about, because of the gradual growth of combination. In all lines of business, both among employers and employees, combinations of great magnitude have grown up, especially of late years. The single man cannot secure his dues as of old, whether an employer or an employee, unless he unites with his fellows. Industry is now a mass of great moving bodies which seek arrangements with each other to save the loss which must result from conflict among its units. In this

economic struggle these bodies are usually able to cope with each other and adjust their affairs, and the combinations have their inception in this purpose. The bewildering decisions of the courts in labor controversies may well cause a court even at this late day to pause. There is a wide difference in these decisions in different jurisdictions. The tendency in all jurisdictions is to increase the latitude given to labor organizations where their activities are peaceful and their aim is to benefit themselves. In all jurisdictions labor organization is considered of late as necessary and useful in modern economic conditions. In many of these decisions words of strong approval of labor organization are used, even where the decision finally strikes at their existence. It is essential to unionism that it shall not foster non-unionism. *Courts do not go to the point now of compelling a union man to work with a non-union man. In the case at bar it is asked that the courts compel a union man to work on the non-union thing made by that non-union man.* The increased scope given to the rights of labor unions by recent decisions is attested by Prof. Groat in his recent able work on the "Attitude of American Courts in Labor Cases." He says at the outset of his work, page 11:

> "The following study of the opinions in labor cases reveals three facts of tremendous importance: (1) The judges of our courts have been too greatly influenced by precedents set in decisions applicable to conditions that have passed away. (2) There is clearly discernible a tendency on the part of many influential judges distributed rather widely among State courts of final appeal and the Federal courts to give more attention to actual present conditions. (3) The law is being adapted to these new conditions by reading new meaning into the phrases of the constitutions, thus making formal constitutional amendments unnecessary."

Even on the question as to whether combination can make the lawful act of one person illegal, which is at the

threshold of these cases, the courts differ widely. For instance, in the State of New York, the authorities seem to follow the ruling in *Nat. Pro. Asso.* v. *Cummings,* 170 N. Y. 315, where it is said:

> "Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of an act."

The law of New York is important because of the charges that these defendants have violated six criminal laws of that State. As mere combination cannot create and constitute crime from otherwise lawful acts in that State, under the above cited Cummings case, the charges of crime, on which appellants seek to rest their claim for injunctive relief must fail.

In another jurisdiction we find:

In *Bohn Mfg. Co.* v. *Hollis,* Minnesota, 1893, 55 N. W. 119, the Court said:

> "What men may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful."

In *Lindsay* v. *Montana F. of L.*, Montana, 1908, 96 Pac. 127, we find:

> "If an individual is clothed with a right when acting alone, he does not lose such right merely by acting with others, each of whom is clothed with the same right. If the act done is lawful, the combination of several persons to commit it does not render it unlawful."

Justice HOLMES wrote in *Vegelahn* v. *Guntner*, Massachusetts, 1896, 44 N. E. 1077:

> "There is a notion which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by

himself will make the otherwise lawful act unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and principle."

Laidlaw, Boycotts and the Labor Struggle, published January, 1914 (p. 206), says:

> "Finally, it is contended that those who declare that combination brings into play an illegal element not found in individual action are superimposing on our present economic structure the old doctrine of conspiracy which has done yeoman service in suppressing all combinations of labor; *that England, from which the common law doctrine of conspiracy was taken bodily, has long since thrown this doctrine onto the scrap heap, as unsuited to the present day, and that this country should follow in its wake, if it is to keep abreast of the times.*"

Other authorities, and many of them, hold that where an act would be lawful if done by an individual, it will be lawful if done by a combination, *provided they have no unlawful object in view.*

> *Doremus* v. *Hennessy*, 176 Ill. 508;
> *Karges* v. *Woodworkers*, 165 Ind. 421;
> *Carew* v. *Rutherford*, 106 Mass. 14.

But the only unlawful object according to the cases along this line is malice. As Martin, in his Modern Law of Labor Unions, puts it (p. 34):

> "*There is nothing in such combination or the carrying out of the object for which it was formed which will furnish any ground for a civil action or a criminal prosecution if the element of malice, i. e., the absence of just cause or excuse*—is not present. So long as the object of the combination is to further its own fair interest or advantage, and not the injury of another, its members are not liable for any injury *which is mere incidental.*"

Let us see how malice is an element. One man may quit work through malice. Why may not many men in malice quit? If one man has a grudge or other feeling against an employer, why may not other men feel the same way, and quit? The employer can discharge all his employees from malice. But malice does not figure in the case at bar, yet unless it does there can be no case, according to the weight of authority, outside perhaps of the federal question involved.

As to what consideration, if any, is to be given to motives the authorities again differ. The Cummings case holds the motives are of no importance, except in the case of malice.

In *Parkinson* v. *Council*, 98 Pac. 1027 (Cal., decided in 1908), the Court said:

> "The rule of law, therefore, as firmly established in England, in this State, and in most of the United States supports the conclusion (as above stated in the Cumming case) so far as it rests upon the doctrine 'that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable in a civil action.'"

Many other decisions consider the motives as important: *Newton* v. *Erickson*, 126 Supp. 949; *Nat. Fireproofing Co.* v. *Builders*, 169 Fed. 259, Prof. Groat, after reviewing many cases, says, page 221:

> "The motive, then, is not usually material. In some decisions it is made so, but the expressions in more general form indicate the direction in which opinion is moving. Doubtless motive will have less rather than more influence. Naturally it will be so, since not only is it almost impossible to determine what the motives really are, but also because the motives are usually mixed, and it is difficult to pick the determining one."

Judge HOLMES in *Plant* v. *Woods*, 57 N. E. 1011, 1016, said:

> "The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my brethren, in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers may employ in their preparations the means which they might use in the final contest."

We have previously referred to the opinion of this Court in the *Loewe* case, *supra*, on this head.

Appellants contend that these defendants' motive is to unionize non-union mills. If so, the purpose for which they do this would indicate the controlling motive. What motive the contracting builders defendants may have in agreement Exhibit "B," is perhaps of no importance as they are not alleged to be conspirators.

Looking at the union from the viewpoint of the methods it employs, we do not find ground for the assertion that the union is unlawful. Where breach of the peace occurs, and force and intimidation have been used by labor, the authorities seem to agree that an injunction properly lies. They differ as to what unlawful intimidation means. A threat to strike where a union has a right to strike would not be considered intimidation. It would be on the same plane of a threat of the refusal to work where the union had a right to refuse to work.

In *Payne* v. *Western R. R. Co.*, Tenn., 49 A. M. Rep. 666, the Court said:

> "If the act intended to be done is not unlawful, then the declaration is not a threat in law, and the

> effect thereof is not intimidation in a legal sense. So, too, of the alleged conspiracy. A conspiracy is an agreement to do an unlawful act. If the act to be done is not unlawful then the agreement or combination is not a conspiracy."

Boyer v. *W. U. Tel. Co.*, 124 Fed. 246:

> "One may lawfully threaten to do what he has a right to do, and a labor organization has the same right as an individual to threaten to do what it may lawfully do."

Are the defendant builders not to be accorded the right to buy only union trim? They are not charged with conspiracy for doing so. But the labor defendants are accused of conspiracy in agreeing to sell their labor as they will.

A total absence of the elements of an unlawful combination is disclosed in this case. The motives of none of the defendants can be properly impugned, their methods cannot be assailed, and conspiracy can only be predicated on one or the other. Not in the mind, the speech or the written word of any of these defendants, has been the name of any complainant. Yet for *declaring for the principle of unionism* they are charged with conspiring against these complainants for the reason that the complainants are part of the body of men whose principle is non-unionism.

Unless the right to sell property to whomsoever and on such terms as the owner wills is to be permitted to ride rough shod over the right of free men to sell their labor at will on their own conditions, this case will not lie. The position of the defendants seems fair and in good conscience. It tends to uplift themselves. It is in accord with the policy of the Federal and State governments to fix a minimum of wages and hours, discountenance competition below that figure, but to have it free beyond. The defendants appeal to one's sense of right. It is only when one enters upon conflicting court decisions, and feels that

he should try to disentangle them, that his own sense of right may become clouded.

The elements discussed under this point, namely, union of action, motives and methods of procedure, as outlined in this case, are integral parts of the organization itself. To forbid the organization to do any of these matters, can only mean disintegration. In none of these elements is the union acting with a view of hurting any particular man's business. In short, there is no conspiracy in this record, unless the organization of itself is a conspiracy, in its declaration of the principle of unionism, carried out for the motives, and under the methods, stated.

Freedom to work collectively under terms approved by all is at the root of the organization, and this case strikes at this root. This contention of appellant gives added force to the address of ex-Chief Judge CULLEN of the New York Court of Appeals at Carnegie Hall on January 30, 1914, on personal liberty, in which he said:

> *"To-day, according to the notions of many if not most people, liberty is the right of part of the people to compel the other part to do what the first part thinks the latter ought to do for its own benefit."*

There is a marked difference between a strike and a stopping of work. A strike lends the force of numbers to the event, which is set for a special time. When a union man knows that under his agreement with the union he should quit work when certain conditions are put before him, and he, and perhaps other men on the same job quit, it is a stoppage of work, more properly called, than a strike. This stopping of work under such circumstances is indicative of a principle being followed, along the lines on which a union is founded, and belies the idea that the members are coerced by officers of the union.

POINT V.

The right to quit work with a non-union man should be accorded to quit work as against a non-union thing.

We contend that if we can show that under the authorities union men, not acting through malice, may refuse to work with non-union men, they would have the same right of refusal to work when a non-union thing is presented to them. There are many cases in all the courts involving the refusal of men to work with non-union men, but very few cases in the higher courts regarding the stoppage of work on non-union articles of merchandise.

While the plaintiffs have the right in a general way to the free sale of their goods, limitations would be in so far as men want to buy them—which seems a trite remark, but invasion of that right seems to be attempted in this case—and in so far as other men want to work upon them. Of course, the above right generally accorded union men to quit work with a non-union man, would apply equally to non-union men having the right to quit work with a union man. So, too, the owner of a non-union piece of mill work would have the right to say he would not have union men work upon it.

We have given most attention to cases in the State of New York under this point, where these defendants are accused of violating six different sections of the Penal Law, of that State, in appellants' brief (appellants' brief, points IV, V, VI, VII and VIII); as also, they are alleged to have violated the common law as declared in that State. Yet it is only in and by this labor organization as such, and this incidental contract, Exhibit "B," of the bill, as stated, that defendants are charged with violating all these laws.

Foremost among labor decisions from the labor standpoint in the State of New York is

Nat. Pro. Asso. v. *Cumming,* 170 N. Y. 315.

In this case the plaintiffs and the defendants belonged to rival labor organizations, and the plaintiffs complained that the defendants had threatened to refuse to work on any job where the plaintiffs were employed, *and had called out workmen in other trades.* Here were sympathetic strikes, approved by the Court.

But the Cumming case was stronger for the plaintiffs therein than for the plaintiffs in the case at bar, because the plaintiffs in the case at bar can sell to other persons, and to all under union conditions, but in the Cumming case *it was found that owing to the acts of the defendants it was impossible for the plaintiffs to get work anywhere in the City of New York, except on small jobs, which the defendants did not care to interfere with.*

The opinion of PARKER, *Ch. J.*, after speaking of the right of any men to quit work for any reason, says:

> "The same rule applies to a body of men, who, being organized for purposes deemed beneficial to themselves, refuse to work. Their reasons may seem inadequate to others, *but if it seems to be in their interest* as members of an organization to refuse longer to work, it is their legal right to stop. * * * *And if the conduct of the members of an organization is legal in itself,* it does not become illegal because the organization elects one of its members to state the reason for its conduct. * * *
>
> "One reason apparent from the findings in this case, as I shall show later on, is the desire of the organization that its own members may do the work the non-union members are performing. * * *
>
> "It seems to me illogical, and little short of absurd, to say that the *every-day acts of the business world, apparently within the domain of competition,* may be either lawful or unlawful according to the

motive of the actor. If the motive be good, the act is lawful. * * *

"Nowhere throughout the findings will be found even a hint that a strike was ordered, or a notification given of the intention to order a strike, for the purpose of accomplishing any other results than that of securing the discharge of the members of the plaintiff association, and the substitution of members of the defendant association in their place. * * * Such a motive is conceded to be a legal one. * * * *The defendant association had the right to threaten to do that which they had the right to do.*"

Curran v. *Galen*, 152 N. Y. 33, which has been said to conflict with the Cumming case, is referred to in the Cumming case by Judge GRAY, page 334, as follows:

"The case is not within the principle of *Curran* v. *Galen* (152 N. Y. 33). Upon the facts of that case, as they were admitted by the demurrer to the complaint, the plaintiff was threatened if he did not join a labor organization, and so long as he refused to do so, with such action as would result in his discharge from employment, and in *an impossibility for him to obtain other employment anywhere*, and, in consequence of his refusal to join the organization, his discharge was procured through *false and malicious reports affecting his reputation* with members of his trade and with employers. There is no such compulsion or motive manifest here. There is no malice found. There is no threat of a resort to illegal methods."

Sinsheimer v. *United Garment Workers*, 77 Hun 215.

In that case Presiding Justice VAN BRUNT, writing the Court's opinion, said:

"I fail to see how the injunction in this case can be sustained. There is no proof of any acts of violence upon the part of the defendant, or of any injury to property, or of any threats or intimidation. At best the circulars were one of the instruments

> used by the defendants in their contest with the association of which the plaintiffs were members."

Mills v. *U. S. Printing Co.*, 99 App. Div. 650.

This is an important case holding in part that a combination to refrain from work with other *persons* is lawful. We shall treat of this case on a point in reference to so-called boycotting. This case came up on an appeal from an order continuing a temporary injunction.

At the trial of this action, and in a similar action (*Kissam* v. *Same*), the complaints were dismissed. These dismissals were affirmed without opinion in

> *Kissam* v. *U. S. Printing Co.*, 128 App. Div. 889.
> *Mills* v. *U. S. Printing Co.*, 128 App. Div. 890.

In 199 New York, 76, the decision of the lower court was affirmed in an opinion covering both cases.

The Kissam action was brought by plaintiff as a stockholder and employee of the U. S. Printing Co., and the Mills action by employee of the same company. They asked to enjoin the company from carrying out an agreement with defendant labor unions to employ only their members, and to discharge all who were not members of defendant labor unions, although such action would prevent the discharged men from getting work elsewhere.

Jacobs v. *Cohen*, 183 N. Y. 207, was a case which holds that an agreement of an employer to employ only members of one labor union is valid, and the employer was held liable on his note to secure the terms of the agreement. Regarding the agreement the Court said at page 211:

> "The inviolability of the right of persons to freedom of action may well extend to any concert of action for legitimate ends, if consistent with the maintenance of law and order in the community, and if not interfering with the enjoyment and the exercise by others of their constitutional rights.

> Their right to combine and co-operate for the promotion of such ends as the increase of wages, the curtailment of the hours of labor, the regulation of their relations with their employer, or for the redress of a grievance, is justifiable."

In *Rosenau* v. *Empire Circuit Co.*, 131 App. Div. 429, it was held here, to the contrary, that "if the means employed to do an act are lawful, *it is of no consequence* that the motive which induced the act was malicious."

Plaintiff's theatre business in Buffalo was ruined by an agreement made by the defendants controlling the principal theatres for burlesque shows, with forty-one burlesque shows, that they would only play in defendant's theatres. Twenty of the burlesque shows which had contracted to show at plaintiff's theatres, cancelled their contracts, on being informed by defendant that if they played for plaintiff they could not play in defendant's theatres. It was found that defendant's theatres were sufficient to occupy all of the time of the forty-one shows. Injunction was denied.

McCord v. *Thompson-Starrett Co.*, 129 App. Div. 130, held that an order of "nearly all the prominent building contractors" which affected "practically all the whole building trade in a locality," forbidding its members to employ artisans *who did not join a particular labor union*, is against public policy. The action was to recover on a bond given by a member to observe the orders of the Builders' Association. Significant of the right to lock-out or strike alone is the opening lines of that opinion, reading:

> "We would find no difficulty in affirming this judgment if the building trades employers' association had gone no further *than to order a general* 'lock-out' of the members of the Brotherhood of Carpenters."

Darling in Am. Law Register, v. 43, p. 95, says:

> **"Supposing a case of inducing is made, that is, supposing the defendants ask to have the plaintiffs discharged, the defendants, if they are fellow workmen with the plaintiffs, or represent fellow workmen, are acting within their rights, because they have an interest in who shall be their fellows; their safety, comfort, convenience and personal pleasure are concerned."**

Parkinson v. *Building Trades' Council,* 9 Pac. 1027 (California Supreme Court), is an important case. It is not only in line with the above cases holding that men may quit work with other men for the latter's discharge, but it has most of the elements of the case at bar. The Building Trades' Council of Santa Clara County, embracing different unions engaged in building operations were pledged that they "would refuse to work for any person or firm who employed non-union men and *they would refuse to work upon or handle any material supplied by an employer of non-union men.*"

Building contractors refused to buy from plaintiff, who had a lumber yard and plumbing and tinning shops, because union men in no trades would work if non-union material was supplied. Some of these contractors had cancelled contracts with plaintiff when informed by officers of the defendants that this result would follow the purchase of material from plaintiff. Defendants' actions had followed a request that plaintiff unionize his business.

In all these respects the Court held the defendants acted within their rights and refused an injunction. The Court quoted with approval the Cumming case, and the *Allen* v. *Flood* case. Yet how much further is the Court asked to go in the case at bar? None of the elements appeared in the Parkinson case of men being asked to work on what their own members did not make; or destroying their own chances of employment and the employment of

their mill members by helping by such work to break up union mills; and the dangers of work in mills of the skilled with unskilled, to which the striking men would by injunction be forced.

But in the Parkinson case the above rules had been adopted without respect to plaintiff. The so-called conspiracy was *impersonal*. The Court said of it:

> *"It embraced the world at large."*

MERCHANDISE NO MORE PROTECTED THAN MEN.

We have one ruling flatly under much the same facts as in the case at bar, and against the same defendants, which considers the status of men and things in this connection. The case is

> *Bossert* v. *Dhuy*, 137 N. Y. Supp. 321; 77 Misc. 592,

where Justice CRANE said:

> "If it be legal to refuse to work with non-union men and strikes may be called to oust them, *so likewise men may refuse to work with non-union material. Labor is as much property as woodwork, and the law which will not protect the one in this particular cannot protect the other.*
>
> "When at work upon a building in which carpenter trim is to be used these men, in carrying out their purpose and agreement, may quit work or refuse to work because the trim has not been made by men of their Brotherhood. Unless by force, threats or intimidation they are compelled to leave the work there can be nothing illegal in calling their attention to the fact that the trim they are handling has not been made by their fellow members, and that to continue working upon it would be in violation of their mutual agreements. It would not amount to force, compulsion or intimidation, to state to these men that they were perfectly free to continue at work upon this non-union

> material if they desired, but that by so doing they could not expect to continue in the Brotherhood with their fellow members and receive its benefits, and would therefore be expelled. If it be legal to form such a union with such a purpose and such agreements, it certainly could not be illegal to expel a member because he refused to abide by the rules and agreements of the union."

Property rights were intrenched in law before men came to sell their labor collectively. It is a satisfaction to have men and things put on the same level of protection. If there was to be a distinction it would seem fair that it should run to men, rather than to things.

POINT VI.

The elements of what usually constitutes a secondary boycott case are lacking in the case at bar.

We know of no *impersonal* boycott cases. The term which is vague is applied to these defendants in Point X, of Appellant's brief. It is a sort of legal term of reproach usually thrown at labor in economic differences, in much the same way as the word conspiracy is applied to the organizations of labor, without there being a definite understanding on the part of the accuser or the accused as to what is meant. It seems that in every case of boycott, primary or secondary, which we can recall, there has been unlawful motives or unlawful methods, usually both, and directed against a particular person.

Bouvier, in his Law Dictionary, 260, says of the word:

> "A boycott is not unlawful unless attended by some act in itself unlawful."

Yet the common significance of the term is akin to a form of lawlessness.

The argument in Point X of Appellants' brief is that the alleged boycott is secondary, because by refusing to work on mill work furnished by the customers of complainants, defendants are acting against third parties with whom they have no grievance. The answer to that seems plain, if we again refer to our non-union man and non-union newel post analogy. These defendants have the same grievance against an employer who puts a non-union man beside them, as they have against an employer who gives them a non-union unfinished newel post for a stairway, for them to work upon. In the latter case the grievance is perhaps greater because the defendants are expected to handle and work upon the newel post.

At the outset of this Point X (Appellants' Brief, 167), appellants quote part of the decision in *Loewe* v. *Lawlor* (208 U. S. 288), which we have previously attempted to show does not apply to the case at bar. Incidentally it will be observed in the Loewe case that the motives and methods were both unlawful; also, the conspiracy was not impersonal but was strongly and effectively directed at the Loewe business, and defendants therein so announced. The important part of this quotation used in their brief is at the end, which we have italicized, where the Court says:

> "That at common law every person has individually and the public also has collectively a right to require that the course of trade shall be kept free from *unreasonable obstructions.*"

An unfair impression may be given by a statement under this point in Appellants' brief (page 168), which says that plaintiffs' customers are threatened "with such *dire consequences* if they deal with plaintiffs, that they are deprived of their freedom of choice, and do not dare to deal with the plaintiffs." It is not explained afterwards that there are no "dire" or any other kind of consequences, except that the union men if they can find out in a certain part of New York City—where they are strong enough—

that non-union material is put before them, they will quit work.

Defendants' conduct is not a restriction on the sale. They do not warn people against the complainants. They do not ask people not to deal with complainants. They leave the purchaser free to deal with whom he pleases. He is at liberty to buy where he will and get whoever he wants as carpenters to install his purchases.

These defendants declare their principle that their own members will only work on mill work which their own members make. They do not say do not buy from complainants. They assert a principle applicable to all non-union mills. It is fair to the purchaser who thus learns in advance he cannot get the labor of these men. He can have no inherent right to the services of these men. they notify him of the conditions under which they will work. If he has no inherent right to their services, the concern from which he buys can have no right *to compel him to work for whoever buys his goods.* Going back to the above definition, these defendants perform "no act in itself unlawful."

Even where so-called boycotts were directed against the parties aggrieved, and not *impersonal* as in the case at bar, we find a wide latitude given before the conditions become unlawful.

What is permitted transcends anything done in this case, which in a nutshell is no more than *a refusal to work and notice in advance thereof.*

The most exhaustive decision in New York with reference to boycotting is:

Mills v. *U. S. Printing Co.*, 99 App. Div. 605, previously referred to. It was contended that the unions in refusing to work with certain men were *boycotting* them. The Court said (pp. 609-10) with regard to boycotting:

> "Some courts have defined it as necessarily implying violence, or intimidation, or the threat

thereof; others, as but necessarily implying abstention. A may refuse to deal with B, unless B changes a certain policy, and A may think that his attitude is necessary for his own welfare and protection. It cannot be contended that A thereby offends the law. * * * If A may take this step it does not seem logical that A and C together may not, and may not by argument, persuasion and entreaty, bring D and E to their side. If A, C, D and E cannot do what A alone may lawfully do, the vice must be in the combination, but there is no dissent in our highest court over the proposition in *Nat. Prot. Assn.* v. *Cumming*, that, '*Whatever one may do alone he may do in combination with others, provided they have no unlawful object in view.* Mere numbers do not ordinarily affect the quality of an act.' PARKER, *Ch. J.*, and VANN, are in accord (pp. 331, 338), and GRAY, *J.*, another judge wrote in that case, has expressly affirmed this principle in his dissent in *Straus* v. *Am. Pub. Assn.* (177 N. Y. 473, 491). A's attitude may be trivial as to B, when that of the combination might enforce B's concession, but this affords no legal reason against such combination. It is not in the breast of the Court to stamp as illegal a combination for the betterment of the interests of the members thereof, or of some of them and which, without incidental violence and intimidation, *severs all business dealings with an outsider*, until it may secure it.'

Further the Court says (611):

"It may be that the result of the boycott is a loss to him prescribed, else the combination would fail of its purpose. But when the result sought by a boycott is to protect the members of the combination, or to enhance their welfare, that loss is but the incident of the act, the means whereby the ultimate end is gained. In *Quinn* v. *Leathem* (App. Cases, 101), Lord Shand marks the distinction between that case and the well-known case of *Allen* v. *Flood* (App. Cases, 1898, 1). He says: 'In *Allen* v. *Flood* * * * the purpose of the defendant was by the acts complained of to promote his own trade interests, which it was held he was entitled to do,

> although injurious to his competitors, whereas in the present case, while it is clear where there was combination, the purpose of the defendant was to "injure the plaintiff in his trade" as distinguished from their intention of legitimately advancing their own interests.' "

Another case in point is *Park & Sons Co.* v. *Nat. Druggists' Assn.*, 175 N. Y. 1, where PARKER, *Ch. J.*, said at page 14:

> "The principle underlying the decision in *Nat. Pro. Assn.* v. *Cumming*, 170 N. Y. 315, is applicable. * * * This language (threats, intimidation and blacklisting) has a formidable sound, but, subjected to the same analysis as was given to the word 'threats' in the connection in which it was used in the Nat. Pro. case (*supra*) it will prove to be without force. * * * The term 'blacklisting' refers to the course of defendants in notifying the trade, in effect, that the plaintiff is outside the association, and prefers to stay out of it rather than be bound by the rules and regulations which other members of the trade regard as fairest and best of all, and insisting that the penalties of such a course shall be meted out to him, namely, that he shall not be allowed any rebate upon any of the manufacturers' goods so long as he shall retain that position. The facts alleged by them are true. The notification is a part of the plan agreed upon by all, and the plaintiff courted it rather than do business on the same basis as his competitors, who together handled about ninety per cent. of the proprietary articles sold."

Butterick Co. v. *Typo. Union No. 6* (50 Misc. 1), holds that a union has the right to publish circulars setting forth "*the circumstances of a strike, and requesting their friends to withhold their patronage*" from the company against which the union has a grievance.

In *Reynolds* v. *Plumbers' Pro. Assn.* (30 Misc. 716), is said:

> "It is not an unlawful interference with the trade of another to advise people to deal with his competitor or to decline to do business with him."

The following points of distinction between the following cases and the case at bar are noteworthy:

1. The action of the strikers was directed against particular concerns, and not in furtherance of a general declaration of principle;

2. No motive of the combination to benefit its members was presented;

3. Efforts to prevent the employment of non-union labor where third parties were involved were presented;

4. The union of strikers was not acting to benefit its own members in keeping them in work;

5. The strikers were not aiming to maintain places where they could get work themselves;

6. The strikers were not seeking to protect their fellow members and themselves in hazardless work from the danger of unskilled men among them;

7. The strikers were not trying to keep part of their members in work so they could continue to contribute to the benefits given by the organization;

8. Interference with and efforts to unionize the business of the employer were presented.

The above points of distinction will be found in the following cases involving the carpenters' union, which appellants refer to in their Point X. Another point of difference is that at the time of these decisions the carpenters were not all in one union, so that in those cases so cited, and to which we are going to refer, the defendants did not have the motive of benefitting their own mills or their own fellow members by refusing to work. We give the dates of these decisions:

Purvis v. *Local 500*, 214 Pa. 348 (1906):

It was further found that workmen had been coerced to quit work. *There is not an item of evidence in the case at bar of a workman quitting except of his own volition.*

Instead of a conspiracy against the world, builders were required to sign such a contract as this:

> "That no material delivered after January 8, 1904, coming from S. G. Purvis & Co. shall be used on the Central Hotel until said mill is operated according to union rules."

There was no evidence that the strikers' fellow members had their own union mills—no evidence of direct or any benefit to themselves by striking was disclosed. Any way, the mechanics would be barred again from looking to the future, because the Court said it could not look beyond "immediate injury to remote results."

> *Shine* v. *Fox*, 156 Fed. 357 (1907);
> *Huttig* v. *Fuelle*, 143 Fed. 563;
> *Lohse* v. *Fuelle*, 114 S. W. 997.

These three cases are quoted as separate cases by appellants (Appellants' brief, p. 168), but they grow out of the same transactions. The first came up on appeal from a preliminary order of injunction; the second was a motion to punish for contempt, and the third came up on demurrer to the complaint. All of the above points of distinction appear in these cases. In addition, in the case of *Shine* v. *Fox*, the Court found that union carpenters wanted to work, but quit on "threats of discipline at the hands of the organization, which meant fines and ultimate expulsion."

Men were fined for refusing to quit work. Employers were forced to sign agreements "putting an end to future business with complainants." Notices were sent out not to buy beer from a brewer, who had used plaintiffs' trim in his brewery.

Booth v. *Burgess*, 65 Alt. Rep. 226 (1906). This case came up on appeal from an order of injunction. All of

the points of distinction, previously stated, appear in the case, as well as this finding:

> "The scheme of the officers of the unions included coercion of the employees of the boss carpenters *to strike against their will.*"

Having trouble in his mill with his men, plaintiff announced his mill would become non-union, and all the unions refused to work on a building where his mill products were used.

The Court wrote an elaborate opinion, which contains the statement that the injunction it issued "was not based on any theory of conspiracy."

But whatever it was it was directed solely against the complainant.

Four of the decisions next cited by appellants in their brief are:

> *Irving* v. *Joint District Council*, 180 Fed. 896;
> *Newton* v. *Erickson*, 126 Supp. 949; Affd. 129 Supp. (N. Y.) 1111; 150 Supp. 1073 (App. Div.);
> *Irving* v. *Neal*, 209 Fed. 471;
> *Bossert* v. *Dhuy*, App. Div. (January, 1915).

They are part of the present campaign of litigation brought by the same American Anti-Boycott Association, which is conducting the case at bar against the union carpenters of the City of New York. As the first of the above decisions in a State Court, *Newton* v. *Erickson*, contained the following conclusions of law by the learned judge who tried it, which are quite similar to the conclusions of law of the learned Court in *Bossert* v. *Dhuy*—both cases being against the same defendants, as in the case at bar—it is not clear how in either case the plaintiffs were entitled to the limited injunctions they each obtained. The conclusions of law in the Newton case were as follows:

1. It was lawful for the members of the carpenters' union to agree, and embody that agreement in their constitution and by-laws, and that they would not work upon any mill products which were not union made.

2. It was lawful for the members of said union to adopt by-laws by which each agreed he should be subject to a fine of $10 if he was found working knowingly on non-union mill products.

3. It was lawful for these unions to elect and employ certain of their members to notify the other members as to whether the mill work they were engaged upon was union or non-union.

4. It was lawful for the union members to quit work in a body whenever they ascertained that non-union mill work was presented for them to work upon.

5. Their right to quit work in a body on the mill work of the plaintiff would not be lost or changed if the striking men had in view the fact that such a strike would tend to reduce the sales of the plaintiff's mill products.

6. The right to quit work in a body on the mill work of plaintiff would not be lost or changed if the striking men had in view the fact that such a strike would tend to increase the sales of the union made mill products of their fellow members in mills.

7. The plaintiff has no right to have the services of the union carpenters in the erection of its mill work if they do not want to work upon it.

8. The union members have the right to inform any builder that they will only work on mill products made by their own members in mills.

9. They have the same right to so inform the builder before he purchases mill products as when he asks them to work upon and install the mill products.

10. That the combination of the defendants to prevent the sale, use and installation of the plaintiff's wood materials by causing all union carpenters to refuse to handle said materials or work upon any building where said materials were being used, is illegal.

11. That the combination of the defendants, as set forth in the findings of fact, constitutes an illegal conspiracy.

12. That the combination of the defendants, as set forth in the findings of fact, and the acts in furtherance thereof, constitutes an illegal conspiracy to injure the plaintiff contrary to *common law*.

In the above stated Newton, Irving and Bossert cases, it was maintained that apart from the general principle of the union against non-union men and non-union mill work, that the defendants had specifically acted against the mill of each plaintiff, and the courts seem to have so found. In the case at bar the plaintiffs go a step farther for a ruling that the declaration of such a principle even if impersonal in its object is unlawful. The judgment of Judge STAPLETON in the Newton case, and of Judge PUTNAM in the Bossert case, as well as the decisions (without opinion), of the Appellate Division affirming each, all grew out of and were founded upon an opinion by Judge BLACKMAR in granting a temporary injunction in the Newton case, 126 Supp. 949, given in full in Appellants' brief (p. 173). The opinions in the Newton and Bossert cases on motions for injunction, judgments and appeals, and in two other similar and unreported cases against these same carpenters, were all brought in Brooklyn, New York City, and all followed this Judge BLACKMAR decision, so that these defendants have not apparently obtained another independent opinion of a court. The court seems to take the position in Brooklyn that other judges should follow a ruling made by one judge in one department on the same facts, until there is a reversal.

Recurring to the said opinion of Judge BLACKMAR, it is found that instead of giving force to the paramount and controlling motive of defendants, he seems to have taken the old method of considering the distance of the motive, and in effect found that because the immediate motive was to unionize the shop of plaintiff the strikes were unlawful. Nor did he consider the combination *impersonal*. It was directed only against plaintiff. The decision has in many places reference to the protection of the good will of a business. It ignores the equal right of union men to sell their labor collectively where they will. It is not consonant with the weight of present authority on labor rights; and cases which he cites in other jurisdictions, *Purvis* v. *United Brotherhood, Lohse* v. *Fuelle, Loewe* v. *Lawlor* and *Beattie* v. *Callahan*, are very different on the facts.

The case of *Aikens* v. *Wisconsin*, 195 U. S. 194, cited in that case and referred to throughout Appellants' brief, merely upholds the power of the State Legislature to enact laws, broadening the definition of malicious mischief, and the learned Judge who wrote the Newton decision made a wrong use of the quotation which he cited, because he *assumed* that the acts complained of were malicious and unlawful, and even if they were malicious, it would be immaterial under the Aiken case unless the acts were by *statute* made unlawful *if malicious*.

Justice BLACKMAR did not have before him the facts of the change defendants members make from outside to inside work, nor the fact that all union mill hands are the fellow members of those the Court orders to work against their fellow members in mills. He does say at page 298 that the ultimate end of defendants is "the improvement of labor." The right to sell labor then must give way to the right to sell goods, where they conflict. If there was any interference with the right to sell goods which was not the result of a refusal to work, the case

would be different. If, as in the *Lohse* v. *Fuelle* case, we had advised people not to buy beer of a brewer, because the brewery was built with non-union trim, the case would be different. If defendants had advised people generally that they must not deal in a store which had plaintiffs' trim, as in the case of *Loewe* v. *Lawlor,* the case would be different. And yet such acts if performed by defendants would find countenance in New York in *Mills* v. *U. S. Printing Co.; Park & Sons Co.* v. *Nat. Druggists; Butterick Co.* v. *Typo. Union; Reynolds* v. *Plumbers' Asso.; Sinsheimer* v. *United Garment Workers* and *Rosenau* v. *Empire Circuit Co.,* and other authorities cited under Point III herein. But these defendants do not go so far. They ask the Court to stay its hand in the protection of the good will of a business, *when it is asked to compel them to work to their own undoing to protect that good will.*

In *People* v. *Davis,* 159 App. Div. 464, also cited under this head against defendants, the facts were not similar. Defendants caused strikes at places which used horses shod by plaintiff and induced outside persons not to trade with people using horses which plaintiff had shod.

There was an effort to injure the plaintiff, through outside parties for whom the defendants did not work. There was no question of withholding work, and no benefit to defendants. Even if they had refused to drive the horses shod by plaintiffs it would not be akin to the case at bar. These defendants are asked to complete the work on buildings partly done by non-union men in mills to their own loss of work and that of their fellow members.

In *Quinn* v. *Leatham,* 1901 App. Cas. 495, Lord SHAND, referring to *Allen* v. *Flood* (1898 App. Cas. 1), said at page 512:

> "In that case I expressed my opinion that while combination of different persons in pursuit of a trade object was lawful, although resulting in

such injury to others, as may be caused by legitimate competition in labor, yet that combination for no such object, *but in pursuit merely of a malicious purpose to injure another,* would be clearly unlawful; and, having considered the arguments in this case, my opinion has only been confirmed."

Again, at page 514, his Lordship continued:

"As to the vital distinction between *Allen* v. *Flood* and the present case, it may be stated in a single sentence. In *Allen* v. *Flood,* the purpose of the defendant was by the acts complained of, to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors, whereas in the present case, while it is clear there was combination, the purpose of the defendants was '*to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interest.*' "

In the *Mogul S. S. Co.* v. *McGregor* (1892) App. Cas. 25, Lord HANNEN said (p. 58):

"The question, however, raised for our consideration in this case is whether a person who has suffered loss in his business by the joint action of those who have entered into such an agreement, can recover damages from them for the injury so sustained. In considering this question it is necessary to determine upon the evidence what was the object of the agreement between the defendants and what were the means by which they sought to attain that object. It appears to me that their object was to secure to themselves the benefit of the carrying trade from certain points."

And, continuing on page 59:

"I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure the plaintiffs whether they, the defendants, should be benefited or not."

POINT VII.

The plaintiffs not having suffered special injury are not entitled to sue at common law for injunction.

As only six of the eight complainants have done or attempted to do business in New York City—where, as we have previously stated, this whole case centers in spite of the national effect sought to be given to it—it follows that only six of them at most could have been specially injured. The Lotham Cypress Company and the Curtis & Yale Company are the plaintiffs who never did business in this City.

Appellants in their Point III (Appellants' brief, 98), urge that "complainants have suffered special damages entitling them to injunctive relief."

In their Point XIV (Appellants' brief, 222-3), they say plaintiffs are all similarly affected and are entitled to injunction. They object at page 222 to "the persistence" of defendants in objecting that in this case the eight complainants cannot be united, and submit just the names of 24 cases without analysis in support of their position.

The complainants are not in the same boat, and while it may be that in so far as defendants had interfered with the Federal or State anti-trust acts, if they had unlawfully so acted, that such parties might unite, nevertheless where they accuse defendants of other violation of separate provisions of the Penal Law of the State of New York, which require intent to commit a crime against somebody and overt acts, and where they found their claim to injunction on the alleged commission of these crimes; and when they rest their case on the common law—we urge that the eight plaintiffs cannot come to court hand in hand.

"Leaving out of consideration remedies as between parties to an agreement in restriction upon competition it seems to have been the strict rule of the common law that no civil liability results merely from the existence of such a restriction. The reason of this rule is that while it is true that an injury is regarded as resulting to a large number of persons vaguely designated as 'the public,' nevertheless the injury to any given individuals is comparatively insignificant, and great inconvenience would result from the recognition of a remedy in favor of each one of so large a number. Thus it has been said: 'It would be unreasonable to multiply suits by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow subjects.' There seems manifest, however, a strong disposition to relax the strictness of this rule, and in the anti-trust acts a right of action is commonly given to one damaged by an action in restriction upon competition."

Cooke, Law of Monoplies, etc., page 314.

Appellants at page 98 of their brief, assert that the six plaintiffs who do business in the City of New York, have lost business during a certain period, and contend they were thus specially damaged. The evidence as to how they lost business, as we have shown in our "Statement of Facts," is conflicting. Even so, this is not proof of special damage. Everyone else who did business in that city may have suffered the same loss for the same reasons.

That a conspiracy must be directed against some definite party is stated clearly in a case that complainants cite for other reasons, that is

Kellogg v. *Sowerby*, 190 N. Y. 370,

where the Court said:

> "The Appellate Division reached the conclusion that 'the acts of the defendant companies in refusing to handle grain from the Kellogg Elevator upon

> the same terms that they have handled grain from the other elevators were unlawful, and such refusal being the natural result and that contemplated by the defendant association when it entered into the contract referred to with said companies, the defendant association became a party to such unlawful acts and equally liable with the defendants therefor.'
>
> *"This statement involves the proposition which we deem to be correct, that in order to render the defendants liable as for a conspiracy, they must have contemplated discriminating against plaintiffs when they entered into the agreements in question."*

It is further so held in

> *National Fireproofing Assn.* v. *Mason Builders, supra,*

which declares that to establish an actionable conspiracy one must show that the combination was maliciously directed against him, and he was specially injured. The Court said:

> "A laborer, as well as a builder, trader or manufacturer, has the right to conduct his affairs in any lawful manner even though he may therefore injure others. So several laborers and builders may combine for mutual advantage, and so long as the motive is not malicious, the object not unlawful or oppressive, and the means neither deceitful or fraudulent, the result is not a conspiracy, although it may necessarily work injury to other persons."

The Court quotes with approval *Mogul S. S. Co.* v. *McGregor,* L. R. (1892) A. C. 25; affirming 23 Q. B. 598, where a refusal to enjoin was affirmed. The defendants' combination had practically obtained control of the China tea trade by giving shippers by their lines rebates, so that plaintiffs' business was ruined.

It is so held in the general nuisance case of *Cranford* v. *Tyrrell,* 128 N. Y. 341, as also, in:

Locker v. *Am. Tobacco Co.*, 195 N. Y. 565; 121 App. Div. 443. This case was brought under the said State Monopoly Act. Plaintiff could not buy certain kinds of tobacco from the defendant, which with allied corporations controlled ninety per cent. of the tobacco trade. The suit for injunction was dismissed. The Court said under the point we are considering:

> "A refusal to sell to any particular individual becomes illegal only when it is done in pursuance of a combination with other owners to *injure the individual with whom they refuse to deal.*"

Although not under this head, we will, while on this case, quote here (p. 566):

> "I do not think the extent of the business can effect the rights of the parties. If it is an inherent right of the owner of property to refuse to sell his property to any particular individual, he cannot be deprived of that right simply because of the magnitude of his business or his wealth."

And note that it would seem that if a union acquired the same proportionate magnitude as above referred to of labor, by a parity of reasoning, it could not be questioned that it would have the right to sell its services where it willed.

While it may be that the tendency is to give individuals a right of action by statute for combinations of general injury to the public, it would appear that the remedy has been a right of action at law for damages, and not for injunction, as witness the Anti-Monopoly Law of New York. Such statutes would also require some definite, direct and certain injury, and they would not search for such injury among conspiracies against the world, or in the mere declaration of a principle.

Proof of special injury is necessary in order to sue in such a case.

Rourke v. *Elk Drug Co.*, 75 App. Div. 145.

In *Gill* v. *Doer,* 214 Fed. 111, the Gill Engraving Co. sued the officers of the New York Photo-Engravers' Union, No. 1, alleging an effort was made to injure plaintiffs' business *by refusal to work.* Plaintiffs' company makes engravings to be used in books and magazines, which require the services of printers and engravers such as members of the defendants' union. It was declared that defendants were engaged in a conspiracy to prevent any journeyman photo-engraver from doing work at the City of New York unless he joined defendants' union No. 1; and to destroy the trade of any engraving company, such as that of the plaintiff, which did not employ members of defendants' union No. 1, the alleged conspiracy being carried on with the aid of the Allied Printing Trades Council, a union of all the trades unions who take part in publishing a book.

In the Gill case defendants acted against third persons, such as publishing houses, by refusing to proceed with the printing of books and magazines when they found that any non-union engravings of the Gill Engraving Co. were to be put in a book. The syllabus explains the decision by Judge Hough on a motion for preliminary injunction, which reads:

> "When the acts of a labor union sought to be enjoined by a preliminary injunction, as producing an irreparable injury to complainant's business, are done primarily with the intent and object of increasing the power of the union so as to obtain more, better, easier and better paid work for its members, and the injury to complainant's business is the incidental result of these acts, a preliminary injunction will be refused."

POINT VIII.

Sections 340 and 341 of Article 22 of the General Business Law of New York has not been violated by defendants.

The alleged violation by defendants of the above stated sections of the General Business Law of the State of New York is made point "IV" of appellants' brief (Appellants' Brief, 106). This statute, which is commonly known as the State Anti-Monopoly Act, is frequently referred to as the act designed to prevent "*corners*" in commodities. The key of the act, so far as defendants are concerned, is the words of the act: "manufacture, production and sale." Defendant craftsmen are not engaged in the manufacture, production and sale on their own account, which is what the act means. They could not create "a corner" in doors by withholding the output of doors from the market, and if they could create a corner by refusing to work on any more of them it would not be done by persons against whom the act is directed, the owners of the commodities.

The general right of freedom to *sell* goods without unlawful interference, we may say here, because the rights of the master builders defendants may be lost sight of, is no greater than the general right to freedom in the *purchase* of merchandise.

> *Montgomery Ward & Co.* v. *S. D. R. M. & H. D. A.*, 150 Fed. Rep. 413;
> *Locker* v. *Am. Tobacco Co.*, 121 App. Div., 443, affirmed 195 N. Y. 565.

In three places this State Anti-Monopoly Act prohibits contracts, etc., "whereby a monopoly in this State" is created. Appellants contend that these defendants who own no mills nor mill work seek a monopoly in mill work for their members. There could be no monopoly in labor under the act which covers only articles of necessity. Besides labor cannot be the subject of monopoly under *Lohse*

v. *Fuelle,* 215 Mo. 421. But as there is no evidence of building conditions outside of New York City, it would be impossible to ascertain if a monopoly in this State is created or is likely to be created, even if they referred to labor as well as to mill work.

Note the heading of the act refers to "contracts" only. The act reads:

> "CONTRACTS FOR MONOPOLY ILLEGAL AND VOID.
>
> Every contract, agreement, arrangement or combination whereby a monopoly in the *manufacture, production or sale* in this State of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this State in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this State of the manufacture, production or sale of any such article or commodity, the free pursuit in this State of any lawful business trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void."

Section 341 only fixes a penalty. The Statute is not intended to cover workmen who have no proprietary rights in the article or a direct interest in what it sells for.

Nevertheless, the act, aside from its criminal provision, only provides for injunction by the State Attorney General. Section 342 states that the Attorney General may bring an action to prevent illegal action by injunction. Sections 343, 344, 345 and 346 prescribe the methods of his procedure.

No private citizen is accorded the right to sue for injunction, and no method of procedure for injunctive relief except on the part of the Attorney General is provided.

This act should be construed as the Sherman Anti-Trust Act, which, as we have attempted to show in point

"II" of this brief, authorizes only the government to sue for injunction under it. The State act seemed to be designed to prevent only such restraints of trade as arise through efforts to create monopolies, or "corners."

Plaintiffs seek to get around the omission of the act to give the injunctive remedy to a private party by contending that as a violation of the act is a crime, a private party can obtain an injunction to forbid the commission of a crime which will specially injure this private party. We again say plaintiffs have not been specially injured within the law, and with regard to injunctions because of the commission of crime, we quote Judge HOUGH in *Gill* v. *Doer*, 214 Fed. 111, as follows:

> "It is asserted that the defendant's acts constitute a crime under New York Penal Code, section 580. I decline to consider such violation as ground for injunctive relief *pendente lite*. Let it be admitted that under *Kellogg* v. *Sowerby* (190 N. Y. 370), a civil suit will lie against a person committing a crime by one who is injured through the commission thereof, and that on final hearing and after a full presentation of testimony authority might compel the issuance of an injunction; but injunctions pending suit are more of grace than of right. I am sure that penal statutes are meant to be enforced in criminal courts; their use as bases for injunction is usually illegitimate and always illogical; even the not infrequent fact that prosecuting officers do not enforce the statute against some citizens and rigidly enforce it against others does not justify an attempted administration of criminal law by courts of equity."

We further contend that the principle that the commission or threat of commission of a crime warrants injunction to one specially injured, cannot be applied to a criminal law which provides its own civil as well as criminal liability, as in the case of this Anti-Monopoly Act. That the act gives the right of injunction to the State

Attorney General is not a ground for the assumption of the right to such suit by a private party because of criminal violation of the act.

The case of *Kellogg* v. *Sowerby*, 190 N. Y. 370, cited by the plaintiffs, is not under this act, but is brought for damages at law for violation of Section 168, subd. 6 of the Penal Code, which now is Section 580, subd. 6, of the Penal Law. That law does not contain any provision for an injunctive remedy, as does the Monopoly Act, and is not applicable.

Both acts refer to conspiracies regarding trade and commerce, though the criminal punishment differs in each.

Complainants' quotation (Appellants' Brief, 116) from the decision in *Kellogg* v. *Sowerby*, that an action to recover damages may be brought against one who has suffered by a violation of the criminal law, does not apply. In the case at bar no damages are sought. The action is for injunction only. A suit at law can be brought to recover damages under the Sherman law, but a private party cannot apply for injunction. The provisions giving the Attorney General the right to apply for injunction are contained in much the same language in both Federal and State acts.

In the following cases the point was not raised that only the State Attorney General could apply for injunction under the State Monopoly Act:

Straus v. *Amer. Pub. Assoc.*, 177 N. Y. 473;
Park & Sons v. *Nat. D. Assoc.*, 175 N. Y. 1;
Locker v. *Amer. T. Co.*, 195 N. Y. 565.

Judge MAYER in the case at bar and Judge WARD in *Irving* v. *Neal*, correctly decided, we believe, on this point, that an action for injunction under the act can only be brought by the State Attorney General.

In *Leslie* v. *Lorillard,* 110 N. Y. 519, a stockholder sought to enjoin payment of the Old Dominion S. S. Co. under a contract by which this company bought off the Lorillard Co., so that the Lorillard Co. was not to do business between New York City and Norfolk. The contract was held valid, although its purpose was to prevent competition and get full control of the steamboat business between those ports.

POINT IX.

No violation of subdivision 6 of Section 580 of Article 54 of the Penal Law is shown.

This is another statute that complainants contend in Point V of their brief that defendants violate.

The part of the act which they say defendants violate, reads:

> "If two or more persons conspire to commit any act injurious * * * to trade or commerce * * * each of them is guilty of a misdemeanor.

Exemptions from the provisions of the act are stated in Section 582, which reads:

> "582. PUNISHABLE CONSPIRACIES. No conspiracy is punishable criminally unless it is one of those enumerated in the last two sections, and the orderly and peaceful assembling or *co-operation* of persons employed in any calling, trade or handicraft for the purpose of obtaining an advance in the rate of wages or compensation, *or of maintaining such rate,* is not a conspiracy."

The policy of the State in exempting labor unions in such cases is further disclosed in Section 43 of the Penal Law.

There can be no contrary deduction from the evidence that these defendants seek to maintain the wages of $15.50 per week of their own members in union mills, as well as to keep these wages for all the members when they go to mill work. Men do not leave work and wages in such a case except for their benefit.

Plaintiffs cite the corner-in-lard case of *Leonard* v. *Poole*, 114 N. Y. 371. Its irrelevancy is too apparent to argue. Next they refer to

People v. *McFarlin*, 43 Misc. 591.

This is an opinion of Judge SUTHERLAND on what is now the above section of the Penal Code, which was rendered on demurrer to an indictment. The indictment demurred to is almost as brimful of threats and acts as *Loewe* v. *Lawlor, supra.*

The indictment charged the defendants with:

> "Inaugurating strikes and boycotts; threatening non-union men that they would drive them out of business and make it impossible for them to obtain work in Rochester; threatening to boycott and ruin and drive out of business non-union manufacturers and threatening to boycott contractors."

The Court said at 595:

> "In so far as the threat to injure property consisted only in the declaration of a purpose to quit the employment of any one who would not submit to their demands, the agreement so to act was not a criminal conspiracy, and if the threat was carried out the resultant injury to the property of their employers, however serious, was but the incident of a lawful right which the striking employees possessed and could exercise singly or collectively, without incurring any liability, either criminal or civil unless there was a breach of contract (*Nat. Pro. Asso.* v. *Cumming*, 170 N. Y. 315)."

The further inapplicability of the case is shown by the remarks of the Judge, page 599:

> "But to go further and threaten the manufacturers with business annihilation, with the waging of a war of destruction against them by the malicious use of the boycott, compelling would-be customers to desist from purchasing because of fear induced by threats that if they do purchase, the full power of the organization will be focused and projected against them to their destruction—such action has never been called legal by any court, so far as my investigation has disclosed."

This seems to be one of the main cases on which complainants rely.

POINT X.

Defendants have not violated subdivision 5 of Section 580 of the Penal Law, nor Section 530 of Article 48 of the Penal Law of the State of New York.

Charges to the above effect are made in points VI and VII of appellants' brief (pages 139-143). Subdivision 5 of Section 580 of the Penal Law reads:

> "If two or more persons conspire to prevent another from exercising a lawful trade or calling or doing any other lawful act, by force, threats, intimidation or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof, each of them is guilty of a misdemeanor."

It would perhaps come with better grace if some one else than the champions of law wages and long hours for labor and the employment of women and children in

mills, should make the point that some laboring men are kept out of work, but nevertheless it would seem to be a matter for the aggrieved laboring man to complain of, and no one else. The record discloses no such men being kept out of work, and as a criminal charge it would be necessary for the complainants to produce the *corpus*. As a civil charge plaintiffs have no standing in court.

Section 530 of Article 48 of the Penal Law of the State of New York reads:

> "That any person who, with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully, *uses violence or inflicts injury* upon such other person or his family or a member thereof, or upon his property or threatens such violence or injury, etc., is guilty of a misdemeanor."

A reading of the above act should be enough without discussion, we submit, to show it has no bearing on the case at bar, unless perchance this last accusation is indicative of the desperate straits to which the complainants have gone in their efforts to fasten some unlawful offense upon these defendants.

POINT XI.

Involuntary servitude prohibited.

While the Sherman Act, with the supplementary provisions of the Clayton Act, does not give labor the right to free trade in labor, that right seems to be vouchsafed by the federal constitution itself, which in Article XIII, reads:

> "Neither slavery or involuntary servitude, except as a punishment for crime whereof the parties shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

It may seem unnecessary for these defendants to get back to such fundamentals as are provided by the federal constitution to sustain their action. But greater stress appears to have been given in this case to freedom of trade than the evidence warrants, and, in fact, the words free trade seem to have acquired a sort of talismanic meaning, how greater, however, must be the rights of labor, as protected by the above provision of the federal constitution, as well as by the other provisions which give men the freedom of contract and liberty, and the pursuit of happiness.

The above quoted provisions of the federal constitution with regard to the rights of labor as stated in

Arthur v. *Oakes*, 63 Fed. 310.

The Court in modifying an injunction issued in that case involving a railway strike said:

> "But the vital question remains whether a court of equity will, under any circumstances, by injunction, prevent one individual from quitting the personal services of another? An affirmative answer to this question is not, we think, justified

> by any authority to which our attention has been called, or of which we are aware. It would be an invasion of one's natural liberty to compel him to work for or remain in the personal service of another. One who is placed under such constraint is in the condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States or in any place subject to its jurisdiction."

The statement, in the long opinion, of limitations on that constitutional right do not cover the case at bar, where the injunction as modified was based on the motive of conspiring "to cripple the property in their hands and embarrass the operation of the railroad."

Ames v. *Union Pac. Ry. Co.*, 62 Fed. 7,

Involved a contract between the receivers of the railroad and the men for a period of service. The Court said, at 14:

> "The receivers were the first to break the contract between the Court and its employes; but, if the converse had been the case the Court could not have directed or enjoined the men to continue in its service. Specific performance of a contract to render personal service cannot be enforced by injunction, by pains and penalties, or by any other means. For a breach of such a contract, the only redress the law affords is a civil action for the damages. The Court is asked to apply to the employes in its service the principles of the early English statutes, which, by the imposition of heavy pains and penalties, forced laborers to work at fixed wages, and made it an offense to seek to increase them, or to quit the service of their employer. The period of compulsory personal service, save as a punishment for crime, has passed in this country. In this country it is not unlawful for employes to associate, consult, and confer together with a view to maintain or increase their wages, by lawful and peaceful means, any more than it was unlawful for the receivers to counsel and confer together for the

> purpose of reducing their wages. A corporation is organized capital; it is capital consisting of money and property. *Organized labor is organized capital; it is capital consisting of brains and muscle. What it is lawful for one to do it is lawful for the other to do.*"

And in so far as complainants would forbid union carpenters from telling, or notifying by circular or other printed matter an employer, that they will not work for him on non-union material, they seek to entrench on the rights of free speech and of the press.

POINT XII.

The policy of the Federal and State governments is to limit competition on public work below certain wages and eight hours a day.

The Act of Congress of June 29th, 1886, legalizing the incorporation of National Trade Unions (24 Stat. 86, C. 567) goes far to declare the federal policy in this regard, and should be considered as exempting labor unions from liability for the acts herein complained of, although the carpenters' union is not incorporated. Section 1 of the Act says:

> That the term "National Trade Union," in the meaning of this act, shall signify any association of working people having two or more branches in the States or Territories of the United States for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and *conditions* of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of sick, disabled, or unemployed members, or the families of

> deceased members, *or for such other object or objects for which working people may lawfully combine, having in view their mutual protection and benefit.*

These defendants have combined for their "mutual protection and benefit," to maintain the wages of their members in their mill work and keep union places of employment open to all of the members, as well as for the care of the sick and disabled and the burial of all.

How the State of New York has endeavored to protect the peaceful efforts of workmen to benefit themselves from charges of violation of the criminal laws has been shown by Sections 582 and 43 of the Penal Law.

LIMIT TO COMPETITION IN LABOR.

There can be no free competition in labor so long as the Federal and State governments by their laws limit competition.

The first by statute limits competition in hours of work. In the construction of all public works of the Federal government the hours of work are eight a day. Every State in the union has by statute fixed an eight-hour day for its public improvements.

A workman cannot seek the job of another by offering to work nine or more hours a day. So competition among workmen on all Federal and State improvements is cut off entirely so far as hours of work per day is concerned.

The Federal government and those of most of the States have further provided for the payment of the prevailing rate of wages to workmen in the different localities where public work is in course of construction.

The State of New York has made its declaration in Section 3 of the Labor Law, as follows:

> The wages to be paid for a legal day's work as hereinafter defined to all classes of such laborers, workmen or mechanics upon all such public works, or upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the State where such public work on, or about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used.

The union rate where union men outnumber the others, which complainants say is the case in part of New York City, is naturally the prevailing rate.

Neither in hours nor in wages is there any competition, therefore, permitted by law on State or municipal public works.

The Federal and State governments are therefore in a great conspiracy to prevent competition in hours and wages, but if these defendants are so engaged the Federal government is asked to enjoin them.

Why is it asked to enjoin? Because the channels of trade and commerce must be kept open, which, so far as labor is concerned on public works, the State and Federal governments have completely blocked.

The Federal and State governments are engaged in a contest, which, because of union rates being generally the prevailing rates, is in effect with the non-union world. And as one State has followed up and adopted the statute of another State in this regard, they have all entered upon a conspiracy to restrict competition in labor, and, indirectly, to put the non-union man who takes what he can get in wages, out of business.

No woman at a buzz saw, getting nine cents an hour with ten hours work a day, can enter into competition for

Federal or State jobs of that sort. The Federal and State governments are wasting the taxpayers' money, for both Federal and State governments could save money by taking the lowest bidders for wages and offers of the longest hours per day.

But they seek to uphold a certain standard of living. So do the carpenters.

For the reasons previously stated in this brief, the judgment of the lower Court should be affirmed.

Respectfully submitted,

CHARLES MAITLAND BEATTIE,
Solicitor and Counsel for the Labor Union
Defendants-Appellees.

IN THE

Supreme Court of the United States.

PAINE LUMBER COMPANY, *et al.*,
Appellants,

against

ELBRIDGE H. NEAL, *et al.*,
Appellees.

BRIEF FOR APPELLEE, JAMES ELGAR, INC.

The appellee, James Elgar, Inc., is one of the "contractor" defendants. There is substantially nothing in the record charging this defendant with the commission of any acts injurious to complainants beyond the mere fact that it is a member of the Master Carpenters' Association and that such Association entered into a contract with the Joint District Council under date of October 30th, 1909, which is attached to the bill of complaint as "Exhibit B."

It will be noted that this contract does not specifically provide that the members of the Master Carpenters' Association shall not purchase or use materials made in non-union shops. The provisions of the contract which are attacked by complainants are found in Article III and in subdivision 2 of Article IV, the relevant portions of which are as follows:

"In any case where a refusal to handle trim ex-

ists it must be decided by the Joint Trade Board within 24 hours or referred to an umpire who shall render his decision within 48 hours" (p. 83).

* * * * * * *

"There shall be no restriction against the use of any manufactured material except non-union or prison made * * * the party of the second part agreeing to erect for members of the Master Carpenters' Association material of any manufacturer which said party of the second part has erected in the above mentioned territory for a non-member during a period of four months preceding the execution of a contract for the use of said material by any member of said Association," etc. (p. 83).

* * * * * * *

"The refusal of the members of the Joint District Council to erect material other than the above specified shall not be considered a violation of this agreement" (p. 84).

The best that can be said of the above provisions, standing by themselves, is that they are more or less ambiguous and uncertain as to their meaning and effect. That is not sufficient to establish the illegality of a contract. To condemn a contract as illegal (whether under the Sherman law or otherwise) it must be incapable of any reasonable construction which would make the contract valid.

Cincinnati, etc., Packet Co. vs. *Bay,* 200 U. S., 179, 184.

D., L. & W. Ry. Co. vs. *Kutter* (C. C. A., 2nd Circuit), 147 Fed., 51.

Hobbs vs. *McLean,* 117 U. S., 567.

Powers vs. *Clark,* 127 N. Y., 417.

Lorillard vs. *Clyde,* 86 N. Y., 384.

This agreement does not expressly state that union carpenters will not work on non-union trim, nor does it provide that the contractors shall not purchase or use non-union trim, and these facts must be established before complainants can show any damage to them giving them a right to complain. If established, it must be by acts, in addition to the mere making of the contract, which place that interpretation upon its provisions. This fact seems to be recognized by counsel for complainants, for the bill of complaint alleges (Par. 26-g.):

> "and that said agreement in section 2 of Article IV thereof, and in the second paragraph of Article III *is intended, regarded and interpreted* by all parties thereto as a prohibition against the purchase and use of said non-union or open shop work by defendant contractors, and a recognition of the rule of said United Brotherhood forbidding its members working upon the same" (p. 42).

If, therefore, any conspiracy in restraint of trade must be found in the acts of the parties *dehors* the written instrument, *a fortiori* no cause of action is proved against any party unless it be shown that he participated in such acts.

Insofar as the respondent James Elgar, Inc., is concerned, there is no proof of any acts done by it or that it has engaged in any illegal conduct under this contract. With the exception of the fact that on one occasion this defendant declined to purchase doors from one of the complainants—W. D. Crooks & Sons (see p. 1195), nothing is proved against it except the mere fact that it belongs to the association which made the contract, not of itself illegal, and that, alone, is not sufficient.

We, therefore, submit that the judgment should be affirmed as to this defendant. We submit that it would not be just to require this defendant to become liable for the large amount of costs which would necessarily attend

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We, therefore, submit that the judgment should be affirmed as to this defendant. We submit that it would not be just to require this defendant to become liable for the large amount of costs which would necessarily attend

a reversal by this Court, when there is no proof of culpable dealing by it or active participation in the acts of which complaint is made.

Indeed we do not understand that complainants seek an injunction against the contractors. They were not included in the preliminary injunction granted, and they are expressly excepted from that part of the bill charging the conspiracy of which plaintiffs complain (Par. 25, p. 36), and even though the judgment below be reversed as to those defendants with respect to whom there is proof of acts beyond the mere making of the contract, it should nevertheless be affirmed as to James Elgar, Inc.

So far as the larger questions involved are concerned, counsel for the other defendants have covered them so thoroughly that nothing can be added by us.

Respectfully submitted,

ANTHONY GREF,
CHARLES J. HARDY,
FREDERICK P. WHITAKER,
Solicitors for James Elgar, Inc.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1914, No. 480.

PAINE LUMBER COMPANY, LIMITED, *et al.*,
Appellants,

AGAINST

ELBRIDGE H. NEAL, individually and as Secretary and Treasurer of the Joint District Council of New York and Vicinity of the United Brotherhood of Carpenters and Joiners of America, *et al.*
Appellees.

Brief for Defendants-Appellees, Members of Manufacturing Woodworkers' Association and Master Carpenters' Association.

Statement of Case.

The dispute between the parties arises because of this condition: The complainants are manufacturers of wood trim. The Brotherhood of Carpenters is composed of journeymen carpenters, some of whom work in shops making trim and some of whom work in buildings erecting trim. It is a rule of the Brotherhood that its members shall

not erect trim in buildings that is not made by their fellow-members. The complainants employ others besides members of the Brotherhood in their shops. The members of the Brotherhood therefore refuse to erect trim made by them. The complainants say that because of this refusal they cannot sell their product in parts of the City of New York, and bring this action to enjoin the members of the Brotherhood from enforcing their rule.

There is a tendency on the part of the complainants to assume the rôle of the altruist—to pretend that for some reason their ultimate purpose is more to be commended than the purpose of the defendants. It should be realized, however, at the outset, that the conflict disclosed by the record is nothing but a particular phase of the great general conflict always being carried on between organized capital, representing society, on the one hand, striving to get as much labor for as small a wage as possible, and, on the other hand, those rendering service striving to get as large a wage for as little service as possible.

The complainants do not wish to employ union men because they can get more hours of work for less wages if their employees are unorganized. The defendants, union members, desire to increase their numbers, thus increasing their strength and thus enabling them to demand more wages for less work.

The Parties to the Action.

The complainants, eight in number, are manufacturers of wood trim, doors, sash and other similar wood products. Four of them have their factories in Oshkosh, Wisconsin; one in Oshkosh,

Missouri, one in Wassau, Wisconsin; one in Williamsport, Pennsylvania, and one in Bristol, Virginia (Bill of Complaint, Paragraphs 1-5, pp. 16-18).

Twenty-four defendants named in the complaint are alleged to be officers or agents of a voluntary association known as the United Brotherhood of Carpenters and Joiners of America. Huber, the President, and Duffy, the Secretary, of the association, were not served with process and are not therefore before the Court. The other twenty-two defendants, representatives of labor, are sued individually and as officers or agents of an association known as the Joint District Council of New York and Vicinity of the United Brotherhood of Carpenters and Joiners of America. Four defendants, Murray & Hill Company, Harlem River Lumber and Woodworking Company, Empire City Gerard Company and James C. Forbes, are manufacturers of trim, doors and sash in New York City (Bill, Par. 23, p. 35). No special reason appears for making one David W. O'Neil a party.

The remaining defendants, over 100 in number, are master carpenters, whose business it is to install trim, doors and sash and other woodwork in buildings.

This brief is submitted on behalf of the defendant employers, being the five defendant manufacturers of trim and the one hundred odd master carpenters.

A Statement of the Facts and Conditions out of which the Controversy Arises.

The United Brotherhood of Carpenters and Joiners of America is an organization of journeymen carpenters. Its membership includes both those who work in shops such as are operated by the complainants, and those who perform the carpenter work entering into the construction of buildings. It appears to have substantially 200,000 members (p. 1563) who belong to some 1,900 unions that are subsidiary to the National Organization and are known as local unions. Its object, by its constitution, is declared, among other things, to be (p. 2655) "to assist each other to secure employment, to reduce the hours of daily labor, to secure adequate pay for our work," and "to furnish aid in cases of death or permanent disability."

The constitution further provides for the organization of local unions by the issuing thereto a charter by the National Organization (Constitution, p. 2657). A "General Convention" of the United Brotherhood is provided for to meet bi-annually and to be made up of representatives from the local unions (p. 2655). The Constitution in evidence (Complts.' Ex. 1-*a*, p. 2666) has this provision regarding trim:

> "It shall be the duty of all District Coun-
> "cils and Local Unions to promote the use
> "of trim and shop made carpenter work
> "bearing this label, and wherever possible to
> "prevent the members under their jurisdic-
> "diction from encouraging the use of any
> "'unfair' material by handling the same."

This provision was amended in 1910 (p. 2081, fol. 6243), but not in a way materially to alter its sense.

While Huber, the National President, is named as a party to the action, he not having been served, the National Organization is not a party to this suit.

There are 70 local unions in New York City and vicinity. These locals are not made parties to this suit.

The constitution of the National Organization provides for the formation of District Councils in localities where there is more than one local union. The provision in the constitution is as follows (pp. 2657-2658):

> "Where there are two or more local unions "located in one city, they must be repre- "sented in a Carpenters District Council "composed exclusively of delegates from "unions of the U. B., and they shall be gov- "erned by such laws and trade rules as shall "be adopted by the D. C. and approved by "the local unions thereof and the G. P. "The General President shall have power to "order such local unions as he may deem in "his wisdom for the best interests of the or- "ganization at large to affiliate with such "District Council in which in his judgment "they should be; to settle the lines of juris- "diction of such D. C. subject to approval "as per Section 93."

The District Council of the City of New York, or, as it is apparently known in that city, the Joint District Council, has a constitution and by-laws of its own (Complts.' Ex. 38, p. 2675). It consists of one delegate from each local union (p.

2676, Sec. 2). It has the following provision concerning trim (p. 2679, Sec. 51):

> "Any member proven guilty of using the "product of any person, firm or mill who "have been declared 'unfair' by their District "Council, or working for any person, firm or "mill who have thus been declared 'unfair', "shall be fined ten dollars for each offence."

By "unfair trim" is meant trim manufactured in what are known as non-union shops [Complt., p. 37, Par. 24, Subdiv. (*a*); Answer of labor defendants, p. 119, Par. 19, Subdiv. (*a*)].

The question of the members of the Brotherhood of Carpenters working upon trim made by non-union members has been often before the National Conventions of the Association. The complainants have put in evidence parts of the proceedings of several of these National Conventions. At a convention held in 1904 the General Secretary in his report had this to say, among other things (pp. 2167-2168):

> "Organized labor has never dealt with a "more serious and important question than "that of the open shop. On the face of it "to those who know nothing either of trade "unionism or the trickery of the employers "it seems fair. Yet it is the most dangerous "weapon ever used by the employing class "to bring about the demoralization and com-"plete destruction of organized labor.
>
> "The principles and policy of the 'open "'shop' cannot be tolerated for a moment by "this organization. If such a system should "be established in any city, it would mean "the decline and final death of all local "unions in that city. With the unions gone, "wages would soon go down, which is ex-"actly what the employers want and what

"they are looking for under the guise of the "'open shop'"

The following is taken from the report of the General President to the Convention of 1906 (p. 2194):

"During the past two years strenuous "efforts have been put forth to organize the "mills doing work which necessarily comes "under the heading of material for the con-"struction of buildings, and, to say the least, "our efforts along these lines have been ex-"ceedingly successful. Not only have the "members worked toward this goal, but the "local unions, district councils and organ-"izers have all lent a 'helping hand.'"

The following from the report of the General Secretary for the same year (pp. 2196-2197):

"Our local unions and district councils, "in the enforcement of their local rules, re-"fusal to work with non-union men and to "handle non-union material, in demands for "better conditions, increase in wages and "a shorter work day, have spent within "the last twenty-five years the sum of "$1,179,776.00."

The Convention of 1910, among other things, resolved (p. 2223):

"That this Convention recommend to all "district councils and local unions, wherever "new agreements are entered into with em-"ployers, that nothing derogatory to fair "mill work be permitted in such agreements."

It is to be noticed that there is nothing in the constitution of the general organization that forbids the members working on non-union trim. The

provision of the general constitution and the transactions of the conventions are in the nature of recommendations as to how the locals may advance their interests.

While these recommendations were being made by the general conventions of the Brotherhood and the members of the local unions in New York City were refusing to work on non-union trim, certain steps were being taken in the City of New York looking toward industrial peace between employers and employees in the Building Trades. Up to 1903 the employers in the Building Trades in the City of New York had no central organization, but in that year—the employees in those trades being thoroughly organized—the Building Trades Employers Association was formed (p. 2510). There had been many strikes against individual employers to their great annoyance, many of which strikes were caused by disputes between labor unions themselves arising out of the question as to the members of what union should do particular work (Testimony, Otto M. Eidlitz, p. 2510). Mr. Eidlitz, who was called by the labor defendants regarding the condition existing in 1903, testified in part (p. 2511):

> "So that the whole situation became very "irksome and absolutely impossible. The "result of it was that the employers came to-"gether and formed themselves into the "Building Trades Employers Association. "Roughly, about a thousand firms came to-"gether as one man and inaugurated this in-"stitution. Then it became necessary to "devise some means whereby there should be "an impartial trial of any case that might "come up, and notice was served upon the "organization that the withdrawal of men "would not be tolerated for any reason, that

"if a man had a complaint, or a union had a "complaint, that proper methods of trying "that would be instituted and that the case "would be heard and justice would be done "without the stoppage of work. I can say "that during the seven years that the board "was in existence that was very successfully "done. There probably has never been an "institution of this magnitude run jointly by "employers and employed where there was as "much good faith shown by the larger num- "ber of those concerned to live up to the con- "tracts as agreed and to try and avoid all "difficulties, and, if they did occur, to arrive "at an equitable settlement."

The board referred to by the witness was the Arbitration Board created by the General Arbitration Plan (Exhibit A, attached to the Bill), adopted in 1903 and revised in 1905. The parties to the plan were, on the one side, the Building Trades Employers Association, representing the employers in all the thirty-three different trades, and on the other the unions representing the employees (pp. 519-520). Its purpose was to do away with all strikes and all lockouts by providing that all disputes should be arbitrated. Section 2 provided (pp. 72-73):

"The unions as a whole or as a single "union shall not order any strike against a "member of the Building Trades Employers "Association, nor shall any number of union "men leave the works of a member of the "Building Trades Employers Association, "nor shall any member of the Building "Trades Employers Association lock out "his employees."

As to arbitration, it provided (Sec. 19, p. 76):

"Where a trade agreement exists between "an Employers Association and a Union

> "all disputes in that trade shall be settled "by a Trade Board of Arbitration with an "umpire, if necessary. The decision of the "said Board or umpire shall be final. Should "the Trade Board fail to agree upon an um- "pire, or should either side fail to abide by "the decision of the Trade Board or umpire, "the question shall be referred to the Gen- "eral Arbitration Board for action within "twenty-four hours after such failure or re- "fusal."

And Section 20, provided:

> "Should a dispute arise in a trade in which "there is no trade agreement between the "Employers Association and the union of "the trade, or between an employer and a "union between whom there is no trade "agreement, said dispute shall be referred "to the General Arbitration Board."

This Arbitration Plan continued in force until 1910, a period of seven years, during which time, Mr. Eidlitz testified (p. 2512, fol. 7536), over nine-tenths of the contentions had been settled and that those decisions are acknowledged by both sides to-day to be the code of rules governing the industry in New York City. The causes which lead to the adjournment of the Board of Arbitration *sine die* created by the General Arbitration Plan are not material here, although they are explained by Mr. Eidlitz (pp. 2513 and 2514). Since the adjournment of the Board strikes and lockouts have generally been avoided by conferences between the Executive Committee of the Building Trades Employers Association and the representatives of the unions and by means of the trade agreement (p. 2514).

It is through these trade agreements that the

defendants, the employers, are brought into this suit. There are two groups of employers parties defendant: the one group being members of the Manufacturing Woodworkers Association who manufacture wood trim, and the other group being members of the Master Carpenters Association who erect wood trim in buildings. An inspection of the trade agreements annexed to the Bill of Complaint (marked Exhibits B and C), shows that their purpose is to dispose of all questions which would be likely to cause strikes or lockouts and that they provide an Arbitration Board for the settlement of any disputes that afterward actually arise. By the agreements, the amount of wages to be paid, the hours to be worked, the holidays to be kept, etc., are all settled, together with a large number of other questions which experience had shown were likely to cause dispute.

It being the policy of the members of the Brotherhood of Carpenters that they would not work upon trim manufactured in non-union shops, a question would arise which would naturally come up for negotiation and final settlement through the trade agreement. The question affected the two groups of members of the Building Trades Employers Association differently:—the Master Carpenters desired to employ the members of the Brotherhood of Carpenters to erect trim, while the Manufacturing Woodworkers naturally desired that the members of the Brotherhood of Carpenters should be willing to erect the trim manufactured by them. To the end that strikes and lockouts should be avoided, an understanding regarding the trim question was necessary. There was apparently more or less contention between the Master Carpenters and the Brotherhood of Carpenters lasting

a number of years. It is hardly necessary to go into the detail of it here. It is thrashed out in the examination and cross-examination of Lewis Harding, a defendant here and a member of the Master Carpenters Association called by the complainants (pp. 2534-2606). The agreement (Exhibit B attached to the Bill) was the end of the dispute.* It is dated October 30, 1909. The object of the agreement is stated at the very outset to be "to insure a peaceable adjustment and settlement of any and all grievances, disputes and differences that may arise between any employer in the Master Carpenters Association and the mechanics affiliated with the Joint District Council of Greater New York." The Joint Arbitration Plan (fol. 242) is made a part of the agreement, and so through that instrument the parties agree that there should be no strikes or lockouts. As to trim, Section 2 of Article IV of the agreement provides (p. 83): "There shall be no restriction against the use of any manufactured material except non-union or prison made." Then after several detailed provisions as to trim, the agreement declares (fol. 251): "The refusal of the members of the Joint District Council to erect material other than the above specified shall not be considered a violation of this

*The appellants in their brief say regarding this controversy, which was disposed of by the agreement between the Master Carpenters and the Brotherhood of Carpenters (Brief, p. 27) that "a reading of the testimony of Harding shows that each of these agreements against trim was the result of the most potent coercion, and the wonder is that the Master Carpenters withstood the demand so long." Suppose that it had been the Brotherhood that had finally given way on this point, instead of the Master Carpenters. Then it must be that such giving way would have been the "result of the most potent coercion" exercised by the Master Carpenters. That is to say, whenever one party gives up a point he is contending for in the course of the negotiation of a contract, he is coerced by the other party.

agreement." The effect of these provisions is, of course, that a member of the Brotherhood was not expected to erect non-union made trim, and that a refusal on his part to erect such trim, or a refusal on the part of the union to consent that its members should erect such trim, could not be regarded as a breach of the agreement. In other words, a strike might be called against such an employer and the agreement not be broken. There is no covenant (as is so often asserted by the appellants) on the part of the Master Carpenters that they will not erect non-union trim.

The Trade Agreement between the Manufacturing Woodworkers Association and the Union states its object to be (Article I, Section 1; Exhibit C attached to Bill, p. 90): "To lay foundation for peace in the mill work industry and the bringing about of uniformity as to hours, wages and general conditions and to provide for the settlement of any and all grievances" that might arise between the Manufacturing Woodworkers and the Joint District Council.

The provisions to be noticed here are those in Section 3 of Article III (p. 93), whereby the employers agree that the members of the Brotherhood of Carpenters are "to be employed exclusively in the mills of the Manufacturing Woodworkers Association;" and in Article II, Section 1 (p. 92), whereby the Unions agree "that none of their members will erect or install non-union or prison-made material," but will erect all materials manufactured in shops of the employers, parties to the agreement, that are made in union mills.

Thus this dispute was settled along with other disputes by the trade agreements which have been employed and developed for that sole purpose.

The parties to these agreements were attending very strictly to their own business when they were negotiating and making them. The Manufacturing Woodworkers came to an arrangement because they regarded it to their interest that the members of the Brotherhood should be willing to work on their trim. The Master Carpenters came to an arrangement because they desired to employ members of the Brotherhood to erect trim.

There is no doubt but that in the greater part of the City of New York the members of the Brotherhood of Carpenters have adhered to the policy not to work upon non-union material and the evidence shows a few instances where they refused to work on the trim of some of the complainants (see *post*, digest of testimony, VI).

The Object of the Brotherhood's Policy and its Justification.

The object of the Brotherhood Carpenters is quite apparent. It is for the purpose of increasing their membership, thus making them stronger, and for the purpose of obtaining the work of manufacturing trim for their own members. If the members of the Brotherhood of Carpenters refuse to erect non-union trim, it will tend to induce those who work in the mills manufacturing such trim to become members of the Union, and it will tend to induce the manufacturers of trim to employ members of the Brotherhood. It is one way, and perhaps the principal way, of making a union strong and of making it an organization that must be listened to by employers. Hardly any one will dispute but what its purpose is a justifiable one.

All realize the great concentration of capital in all kinds of undertakings. Individuals who work for great companies can deal with them on nothing like an equal footing. A request from one of two or three thousand employees for an increased wage or a shorter day carries no weight. If those who are employed by such concerns are to deal on anything like an equal footing with them, they must be thoroughly organized—they must be strong if they are to receive a hearing.

Object of Complainants.

The object of the complainants is in general to keep their employees disorganized; for then they can deal with such employees more advantageously to themselves.* They will be able, under such circumstances, to insist upon their employees working longer hours and for less wages. The advantages to employees of organization, such as is provided by the Brotherhood of Carpenters, and the disadvantages of disorganization, such as the complainants insist upon, would hardly need proof; but if proof were necessary, it is illustrated by the evidence in this case. The minimum wage paid by the Union mills under the agreement between the Manufacturing Woodworkers and their employees is $17.00 a week in Manhattan and the Bronx and $15.50 in the other boroughs (p. 94). The employees work 48 hours a week in the boroughs of Manhattan and the Bronx and 50 hours a week in the other boroughs (p. 94). This is a minimum wage of from 31 to 35 cents an hour,

* It is not intended to charge the complainants with any different attitude or intentions than those possessed by employers in general. It is simply intended to express in plain terms an economic fact.

while the minimum wage in the Paine Company's mill is 17½ cents an hour (p. 1651); besides there are a large number of women, boys and girls employed at a wage of from 9 to 15 cents an hour (pp. 1649-1651). The conditions do not materially differ in the shops of the other complainants. In Morgan's factory there were employed 350 men, 150 boys and 30 women (p. 1780). In McMillan Company's factory wages ran from 10 to 40 cents an hour with a ten hour day (pp. 1855-1856). In Lotham Cypress Company's factory at Oshkosh the hours are 10 hours a day with a wage from 18½ to 25 cents an hour (p. 1885). Came, of the Bristol Door & Lumber Company of Virginia, testified that the average wage paid the 50 men employed by that company was 17½ cents an hour; that the men work 10 hours a day six days in a week, and that the Bristol Company did not unionize because it would be more expensive to run its shop (pp. 2008-2010). This is the reason that none of the complainants will deal with the Brotherhood. They can run their shops cheaper with their employees disorganized. Nevertheless, though refusing to favor the members of the union, the complainants actually, but not avowedly, require that the members of the Brotherhood of Carpenters should work upon their trim. It is plain this is the only thing that will aid them. They ask, not that the channels of trade shall be cleared of any obstructions that the defendants have placed therein, but that the members of the Brotherhood of Carpenters help them to sell their trim by working upon it. The complainants do not claim that they may have an order directing the members of the Brotherhood to work upon their material. What they ask is an order declaring the by-law unlawful and pro-

hibiting any representative of the unions from doing anything to carry it out. When trim comes upon a job, it is impossible to tell whether it is made in a union or non-union shop, and men are employed by the union to ascertain where it comes from and to inform the men on the job in case it comes from a non-union shop. Those thus employed by the union are so objectionable to the complainants that they are described by the complainants as "spies" (Applts.' Brief, p. 23). So that if the complainants are able to get an order forbidding any representative of the Union ascertaining where the trim comes from and giving the men on the job the information thus obtained, they will succeed in getting the members of the Brotherhood to work upon their trim through ignorance, and thus obtain by indirection what they could not obtain directly.

The complainants say that they do not object to individual men refusing to work upon their material, but they do object to men making an agreement that they will not work thereon, and they say this because they know that the individual workman is powerless to make headway against such organizations as the several complainants'. This is but another phase of the non-union employer's insistance upon the disorganization of his employees. In this phase he says, let there be unions, but should any union make any rule that interferes with my business in case I do not conform to it, then let such rule be paralyzed by injunctive order. It is useless to declare the right of laboring men to organize into unions if they cannot determine the question most closely related to their activities, viz., how and where to dispose of their labor in order to reap the most advantage to

themselves; and when no malice is involved, it cannot be that it is for employers or others to interfere with them or the regulations they make. Any regulation of the members of a union by which they withhold their labor from certain employers is very likely to injure such employers; and if every time an employer found himself so situated, he could have the Union's regulation nullified by injunction, directly or indirectly, then the organization afforded by a union would be valueless as a protection against organized or concentrated capital, or as a means by which wage earners could advance their interests.

The defendants submit that the complainants are not entitled to an order of the Court which either by direction or indirection will compel the members of the Brotherhood of Carpenters to work upon the complainants' material in order that they might sell the same. The Union members say, which seems to be reasonable, that they will bestow their favors on those who favor them, and withhold their favors from those who refuse to favor them. The only favor that the members of the Brotherhood have to bestow is the bestowal of their labor. The members of the Manufacturing Woodworkers' Association have consented to employ members of the Brotherhood, and the members of the Brotherhood have agreed in return that they will work upon the material manufactured by them. The complainants have declined to man their shops with Brotherhood men, and the members of the Brotherhood of Carpenters have refused to work upon their material.

Appellants (Appellants' Brief, p. 65) quote this from the testimony of the defendant Neal, a member of the Brotherhood: "If the union men work-

ing on the building should not discriminate against the non-union material, the non-union mills, through competition, would practically drive every union mill out of existence," and therefore (to pursue the complainant's thought) the members of the Brotherhood of Carpenters should work on complainants' materials to help them sell the same, thus enabling the complainants (whose men work longer hours and for less wages) to make it impossible for the union mills to survive, resulting in the workers in the union mills losing their employment or having to work for less wages and longer hours. In other words, the members of the Brotherhood must work on the complainants' material to the end that the complainants may be benefited and their own members grievously injured. *It can never be lost sight of that what the complainants are actually seeking is the active and affirmative aid of the members of the Brotherhood to market their materials.* What the Brotherhood members have done is to withdraw such aid. They are carrying on no crusade specifically directed against any of the complainants. They have not undertaken to regulate anything but what very peculiarly belongs to themselves. They have done nothing directed at interference with the business of any of the complainants, but in order to broaden their markets the complainants claim the right, in a measure, to direct the labor of the Brotherhood members and a right to interfere with the agreements which the Brotherhood members have made among themselves and with others as to how and where that labor shall be bestowed.

The Pleadings.

The offense alleged in the complaint (Complt., par. 25, p. 36) is that, with the exception of the "Contractors," the defendants "have for many years past been engaged in * * * a conspiracy to * * * prevent * * * each of your orators * * * from engaging in interstate trade * * * to sell * * * goods for * * * use * * * in the City of New York."

The Master Carpenters being excepted from the charge of conspiracy the charge is therefore made only against the twenty-two agents of the Joint District Council, the four members of the Woodworkers' Association and David W. O'Neil.

It is further alleged that for the purpose of making effective the combination:

1. The Brotherhood and Joint District Council have adopted the rule that no member of the Brotherhood should use or work upon non-union trim (Subs. *a, b, and c*, par. 26 of the Complt., pp. 37-39).

This allegation is not denied.

2. The Brotherhood has an understanding with the other trades that such trades will join in sympathetic strikes if requested so to do where non-union trim is being used (Subdiv. *d*, Par. 26, Complt., pp. 39-40).

This is denied by the representatives of the unions (Answer of Neal, Par. 19, Subdiv. *d*, p. 119) and no evidence of it is submitted.

3. The alleged conspirators have instigated and joined in strikes where the complainants' materials

were being used (Complt., Par. 26, Subdiv. *e*, p. 40).

This is denied, except that it is admitted in the answer of the Joint District Council's agents that members of the Brotherhood refuse to work on the complainants' products (Neal's Ans., Par. 19, Subdiv. *e*, p. 120). The testimony discloses that on several occasions members of the Brotherhood have quit work on jobs when complainants' material was being used.

4. Builders and architects have been coerced by fear of strikes caused by the defendants' conspiracy to refuse to purchase complainants' products (Complt., Par. 26, Subdiv. *f*, p. 40).

This is denied by the labor defendants (Neal's Ans., Par. 19, p. 119). No proof of this allegation is offered other than that the record indicates that the known attitude of the union toward non-union trim has probably deterred owners and builders *who wish to employ Brotherhood men to erect trim* from purchasing that which they refuse to erect.

5. The Joint District Council would not enter into any agreement with the Master Carpenters until some clause enjoining the use of non-union material was inserted, and the Master Carpenters were coerced to enter into the agreement, Exhibit B (Complt., Par. 26, Subdiv. *g*, pp. 40-43).

That the representatives of the workmen insisted upon a clause substantially as is contained in the agreement is admitted, but that the carpenters were coerced to make the agreement is denied by both the Master Carpenters and the Brotherhood members (Master Carpenters' Answer, Par. 5, p. 131). No proof is offered of such coercion.

6. The agreement, Exhibit C, between the Woodworkers and Joint District Council was made (Complt., Par. 26, Subdiv. *h*, p. 43).

This allegation is admitted.

7. "Unfair lists" have been circulated among architects, builders and contractors of New York City (Complt., Par. 26, Subdiv. *i*, p. 43).

This is denied by Neal in his answer, and there is no proof of any instances where the complainants have been placed on "Unfair Lists."

8. Printed lists containing the names of firms and corporations who employ union labor in their mills have been circulated in New York City by the alleged conspirators preceded by the following statement (Complt., Par. 26, Subdiv. *j*, pp. 44-45):

> "In order to avoid any labor trouble on "jobs you are interested in, we deem it nec- "essary to request you to stipulate in all "your contracts a clause, guaranteeing the "employment of recognized union men; also "a clause requiring in the execution of all "contracts for carpenter work, the employ- "ment of union made trim, mantles, par- "quet-flooring, and other shop made carpen- "ter work. This applies particularly to all "classes of kalameined and metal-covered "work.
>
> "We desire to inform you, that unless this "material has been constructed under strict "union conditions we shall refuse to handle "it.
>
> "It being a well known fact that the "agents of unfair and non-union firms resort "to misstatements in order to obtain con- "tracts in this city, we recommend that be- "fore placing contracts with any firm not on

"this list, you communicate with this organi-
"zation regarding the union standing of said
"firm.

"Stipulating in your contract that your
"trim, etc., must bear this union label:

(Here appears cut of label)

"will avoid all complications.

"We respectfully call your attention to
"the following firms, manufacturers of in-
"terior woodwork, etc., who are working un-
"der an agreement with this District Coun-
"cil.

"This list is, however, subject to revision
"monthly, and contracts let therefrom will
"only be protected, if let within the month
"for which the list is issued, or if stipu-
"lated as a condition of acceptance the above
"union label on the work.

"Later lists can be obtained on applica-
"tion to D. F. Featherston, Sec'y, 142-144
"East 59th Street. Phone 2021 Plaza."

The defendants, agents of the Joint District Council, admit that such lists have been prepared and in some cases preceded by the statement above quoted, but say that the use of such statement had been discontinued before the commencement of this action (Neal's Ans., p. 121). In the quoted statement it will be noticed that no reference is made to any of the complainants, nor does the statement contain anything more than a notice that the members of the union will not work upon materials made in non-union mills. There are no threats of injury to anyone's business in case the suggestions are not followed.

No proofs were submitted tending to broaden the facts as here admitted by the labor defendants.

9. The Union has raised funds to carry out the rule that its members shall not work upon material manufactured in non-union mills and to prevent the complainants from transacting interstate commerce (Complt., Par. 26, Subdiv. *k*, pp. 45-46).

This is denied by defendant Neal in his answer (Neal's Ans., Par. 19, p. 119). There is no proof offered to show that any of the defendants have raised any funds to prevent the complainants from carrying on their business. The only proof on this head is that in a report of the proceedings of a convention held five years ago (1906) it is stated that in carrying out the rules of the union, among others, the rule not to handle non-union material, the sum of $1,179,776 has been spent in twenty-five years (p. 2197).

The Testimony.

The testimony is digested in an appendix attached hereto. In digesting it, an attempt has been made to fairly present in as small a compass as possible what is in the record—what the witnesses said, without any attempt to state conclusions. It would seem that in the statement of the case made on behalf of the complainants, conclusions of facts, characterization of the testimony and arguments so predominate that no fair idea of the testimony can be gained therefrom.

Facts Summarized.

The Trial Court has well and succinctly summarized the facts as follows (Opinion, 2878 at p. 2884):

"1. The journeymen carpenters in the Bor-"ough of Manhattan and in parts of the Bor-"ough of Brooklyn very generally belong to "the Brotherhood of Carpenters.

"2. Owing to the fact that members of the "Brotherhood refuse to work with non-mem-"bers, and to the further fact that employers "in the Building Trade deem it wise to em-"ploy Brotherhood men, it is difficult, and "under ordinary circumstances, impractic-"able, to erect carpenter work in the Bor-"ough of Manhattan and in parts of the Bor-"ough of Brooklyn except with union men.

"3. The Brotherhood of Carpenters has a "by-law that its members will not erect ma-"terial made by non-union mechanics.

"4. The Brotherhood of Carpenters has "given notice that its men will abide by this "by-law.

"5. The by-law is enforceable by fine.

"6. On several occasions in the past few "years the members of the Brotherhood have "quit work where complainants' products "were being used and where the products of "other so-called non-union mills were being "used.

"7. The enforcement of the by-law in ques-"tion by the Brotherhood of Carpenters and "the provision in the agreement with the "Master Carpenters relative to the use of "non-union trim have lessened the sale of "complainants' product in the Borough of "Manhattan and in some parts of the Bor-"ough of Brooklyn.

"8. The workmen have adopted and pur-"sued the policy complained of to better their

"condition in a continuing economic strug-
"gle, with no malice to the particular com-
"plainants herein, but as part of a plan to
"accomplish a nation-wide unionization in
"their trade.*

"9. The contractors or master carpenters
"have entered into their trade agreements
"after elaborate negotiation and for the pur-
"pose of establishing and maintaining peace-
"ful relations which shall obviate strikes
"and other disturbing labor troubles."

General Observation.

Before entering upon any formal argument, the general suggestion is ventured that there can be no distinction in principle between a refusal of union laborers to work with non-union laborers and a refusal of union laborers to work upon material that has been prepared by non-union laborers. The material for trim might be, as in former times it in fact was, prepared on the job. If that were done now a union man would refuse to erect it. It is difficult to see how the fact that the material might be prepared in the next building to the job, or that it might be prepared in Oshkosh, Wisconsin, can affect legal rights. In both cases the purpose of the men is to increase the membership of the union. The right of the union men to refuse to

* We agree with this if it is understood that the only "policy" pursued is the policy not to work on non-union trim, and that by "a nation-wide unionization" is meant that it is the plan of the union to increase its membership wherever it can. There is nothing in the evidence (whether the fact be material or not) to show that the union as such has a definite plan of getting every carpenter in the country into its membership; and it is certain that there is no proof tending to show that outside of and in addition to the by-law in question there is a combination having for its direct object the preventing of the complainants doing business, and therefore in restraint of trade.

work with others than members of the union has been asserted in many cases and has never been doubted. Nearly three-quarters of a century ago Chief Justice Shaw (*Commonwealth* vs. *Hunt et al.*, 4 Met. 111, at 128) said:

> "Stripped, then, of these introductory re-
> "citals and alleged injurious consequences,
> "and of the qualifying epithets attached to
> "the facts, the averment is this, that the de-
> "fendants and others formed themselves into
> "a society and agreed not to work for any
> "person who should employ any journeymen
> "or other person not a member of such so-
> "ciety *after notice given him to discharge*
> "*such workman. The manifest intent of the*
> "*association is to induce all those engaged*
> "*in the same occupation to become members*
> "*of it. Such a purpose it not unlawful.* It
> "would give them a power which might be
> "exerted for useful and honorable purposes
> "or for dangerous and pernicious ones."

It is true that the complainants have a right in general to a free market for their goods and have a right to operate non-union shops, but the question here is whether they can deprive the defendants of *their* rights and of *their* freedom to contract and exercise control over the labor of the members of the Brotherhood in order that the complainants may be aided in marketing their products.

POINTS OF LAW.

POINT I.—None of the defendants nor any group of them have violated the Federal Anti-Trust Law.

1. *The facts do not show that the defendants have entered into a combination with the malicious motive of injuring the business of any of the complainants as charged in the complaint.*

The complainants charge by paragraph 25 of the complaint "that excepting the 'contractors' all of the defendants * * * have for many years past been engaged in an oppressive and malicious scheme * * * to prevent * * * your orators * * * from engaging in interstate trade or commerce to sell * * * goods in the City of New York."

The trial Court came to the conclusion that the allegation was not sustained by the evidence, but that the purpose of the workmen was to benefit themselves in a continuing economic struggle. It has heretofore been conceded, that no malice existed. The record shows that there was none.

It is claimed by the appellants that the defendants or some of them are carrying on what is known as a secondary boycott. As it would seem that whether or not the defendants are carrying on such a boycott has to do with the question as to whether or not the defendants are actuated by malice, this charge against the defendants is taken up here.

No one has undertaken to give a very exact definition of what constitutes the secondary boycott. It involves the idea of the combiners going outside of their own business and affairs to induce

or compel innocent third parties to come into the fight to help the combiners carry on the same against their opponents, as in *Thomas* vs. *Cincinnati R. Co.* (62 Fed. Rep. 803) cited by the appellants, in which Judge Taft wrote the opinion. The secondary boycott is not in itself a crime or a tort. It comes under examination in considering the tort of conspiracy, because the facts, transactions and dealings which go to make up what has been generally termed the secondary boycott have usually been considered evidence of a malicious motive on the part of the combiners. In considering this question the appellants say (Applts. Brief, pp. 167, 168 "the primary objection of the plaintiffs to the combination set forth in this case is that third and neutral parties who are their customers or possible customers are threatened with such dire consequences if they deal with the plaintiffs that they are deprived of their freedom of choice and do not dare to deal with the plaintiffs." This language is picturesque, but is not warranted by the facts. The labor defendants have done nothing but make a rule regarding the disposition of their own labor, and for the purpose of advancing their own interests. No defendants or group of defendants have taken any steps directed at interfering with the business of any customer of any of the complainants. There have been no attempts to induce others not to deal with or patronize such customers. The case entirely lacks the element of anything in the nature of an attack directed against the complainants. If the labor defendants were working generally on all trim except that manufactured by the complainants, and were striking on the jobs of the complainants' trim only in order to induce the complainants to comply with some demand made by

the union, the case would present a different aspect; but even then would not be very strong if there was nothing in it except the refusal of the men to work. But that is not the situation. There is nothing that has any resemblance to a fight being carried on by the union against the complainants to compel the complainants to unionize their shops. The officers of some of the complainants were called upon shortly before this suit was begun by persons unknown, representing themselves to be members of the Brotherhood of Carpenters (see digest of testimony, Appendix I), and inquiries were made of such officers as to whether their companies would not unionize their shops; but not even to all of the complainants was such a request made. The representative of the Bristol Door Company said that company did not unionize because it would be more expensive to run the shop and that it had never been asked to unionize by any union representative (pp. 2009-2010). The representative of the Gould Company testified that three men purporting to be representatives of the Union called on him and asked him if the company would consider turning the works into a union shop; that he answered that the company would not consider such a proposition and that the committee visited pleasantly with him for half an hour saying that it would be to the interest of the company to use the union label (pp. 1895-1897). The contest, such as it is, has more the appearance of one in which the complainants are undertaking, with the aid of the court, to compel the members of the union to work on their material, than one in which the union is undertaking to compel the complainants to unionize their shops.

The appellants frequently speak of an "illegal plot" or "criminal plot", and insist that anything

done in pursuance of such a plot may be enjoined and that therefore anything done to carry out the agreements complained of may be enjoined. But there is no plot, criminal or otherwise. The object undoubtedly is to induce proprietors of mills to employ members of the Brotherhood therein; but there is no unlawful scheme on foot directed against the complainants to injure them, of which the refusal to work on non-union trim is merely an element. If a labor union were carrying on an attack directed against some individual or individuals, it is easy to see how the by-law in question might be used as a step in an unlawful plan; but the element that is wholly lacking here is an attack on anybody.

2. *The by-law of the union and the trade agreements were made to regulate the conduct of the members of the union and the parties to the agreements touching matters directly affecting their own business and affairs. Such a by-law and such agreements are not unlawful unless made or carried out with the malicious motive of injuring others.*

Of course, any combination of persons directed at maliciously injuring another, whether in his business or otherwise, is actionable, and this is so whether the combination is in restraint of trade or not. If such a combination is directed against an individual to prevent him carrying on interstate commerce, it is a violation of the act; but here there is no malicious combination on the part of the defendants to injure the complainants,—no conspiracy directed specifically against the complainants to prevent them carrying on interstate trade or doing any other lawful thing. The sole object of the defendants is to legitimately foster their own

interests. *Thus the vital allegation of the complaint is admittedly unsustained.* All the accompanying facts which showed that there was an unlawful combination in such cases as the *Buck Stove* case (*American Federation of Labor* vs. *Buck Stove Co.*, 33 App. Cases, Dist. of Col. 83) and the *Danbury Hat Case* (*Loewe* v. *Lawlor*, 208 U. S. 274), are wanting here. In those cases the defendants had repeatedly and continually been guilty of such acts as not only showed a malicious purpose, but showed a malicious purpose *directed specifically against the respective plaintiffs.* The evidence showed in those cases that a scheme was being carried on for the express purpose of preventing the particular individuals in question from carrying on business. No such scheme and purpose appears here, *but all the authorities are to the effect that in order to make out an actionable conspiracy such a malicious scheme must be proved.*

Nat'l Fireproofing Co. v. *Mason Builders' Ass'n* (169 Fed. Rep. 259).

Natl. Protective Ass'n v. *Cumming* (170 N. Y. 315).

Jacobs v. *Cohen* (183 N. Y. 207).

Curran v. *Galen* (152 N. Y. 33).

Toledo A. A. & N. M. Ry. Co. v. *Pennsylvania Co.* (54 Fed. Rep. 730).

Commonwealth v. *Hunt et al.* (4 Met. 111);

Vegelahn v. *Guntner* (167 Mass. 92);

Pickett v. *Walsh* (192 Mass. 572);

Purvis v. *Local No. 500, Brotherhood of Carpenters & Joiners* (214 Pa. St. 348);

Erdman v. *Mitchell* (207 Pa. St. 79);
Quinn v. *Leatham* (L. R. [1901], A. C. 495);
Allen v. *Flood* (L. R., 1898, A. C. 1);
Mogul S. S. Co., Ltd. v. *McGregor* (L. R. [1892], A. C. p. 25);
Kissam v. *U. S. Printing Co. of Ohio* (199 N. Y. 76);
Parkinson v. *Building Trade Council et al.* (154 Cal. 581);
Lindsay & Co. v. *Montana Fed. of Labor* (37 Mont. 264);
State v. *Van Pelt* (136 N. C. 633).

In *Nat'l Fireproofing Co.* v. *Mason Builders' Ass'n*, Judge Noyes said, at page 265:

"As a general rule, it may be stated, that "when the chief object of a combination is "to injure or oppress third persons, it is a "conspiracy; but that when such injury or "oppression is merely incidental to the car-"rying out of a lawful purpose, it is not a "conspiracy. Stated in another way: A "combination, entered into for the real "malicious purpose of injuring a third per-"son in his business or property, may amount "to a conspiracy and furnish a ground of "action for damages sustained or call for an "injunction, even though formed for the "ostensible purpose of benefiting its mem-"bers and actually operating to some extent "to their advantage. But a combination with-"out such ulterior oppressive object, entered "into merely for the purpose of promoting "by lawful means the common interests of "its members, is not a conspiracy. A "laborer, as well as a builder, trader or man-"ufacturer, has the right to conduct his "affairs in any lawful manner, even though "he may thereby injure others. So several

> "laborers and builders may combine for "mutual advantage and, so long as the mo- "tive is not malicious, the object not unlaw- "ful nor oppressive and the means neither "deceitful nor fraudulent, the result is not "a conspiracy, although it may necessarily "work injury to other persons. The damage "to such persons may be serious—it may "even extend to their ruin—but if it is in- "flicted by a combination in the legitimate "pursuit of its own affairs, it is *damnum "absque injuria*. The damage is present, but "the unlawful object is absent. *And so the "essential question must always be, whether "the object of a combination is to do harm to "others or to exercise the rights of the "parties for their own benefit.*"

In the *Steamfitters' case* (*supra*), Chief Judge Parker said (p. 328):

> "It is only where the sole purpose is to do "injury to another or the act is prompted "by malice that it is insisted that the act "becomes illegal."

And at page 331 the learned Judge said:

> "Having finished the discussion of the "facts, I reiterate that, within the rules of "law I have quoted, it must appear, in order "to make out a cause of action against these "defendants, that in what they did they were "actuated by improper motives, *by a "malicious desire to injure the plaintiffs.*"

In the Tailors' case above cited (*Jacobs* v. *Cohen*), Judge Gray, in upholding an agreement which had been entered into between a firm of tailors and their employees, by which such firm agreed to employ only members of a single union

or of a union to which their employees belonged, said, at page 211:

> "Nor does the answer aver that it was in-
> "tended thereby to injure other workmen or
> "that it was made with a malicious motive
> "to coerce any to their injury through their
> "threatened deprivation of all opportunity
> "of pursuing their lawful avocation."

In *Curran* v. *Galen, supra,* the Court of Appeals quotes with approval (p. 38) from an instruction given to the jury in an English case, as follows:

> "A combination for the purpose of injur-
> "ing another is a combination of a different
> "nature *directed personally against the*
> "*party to be injured,* and the law allowing
> "them (the workingmen) to combine for the
> "purpose of obtaining a lawful benefit to
> "themselves, gives no sanction to combina-
> "tions which have for their immediate pur-
> "pose the hurt of another. The rights of
> "workmen are conceded, but the exercise of
> "free will and freedom of action within the
> "limits of the law is also secured equally to
> "the masters. The intention of the law is at
> "present to allow either of them to follow
> "the dictates of their own will with respect
> "to their own actions and their own prop-
> "erty, and either, I believe *has a right to*
> "*study to promote his own advantage or to*
> "*combine with others to promote their*
> "*mutual advantage.*"

In *Toledo A. A. & M. Ry. Co.* v. *Pennsylvania Co., supra,* Taft, Circuit Judge, at page 738, said:

> "As usually understood, a boycott is a
> "combination of many to cause a loss to one
> "person by coercing others, against their
> "will, to withdraw from him their beneficial
> "business intercourse, through threats that,

> "unless those others do so, the many will "cause similar loss to them. Ordinarily, "when such a combination of persons does "not use violence, actual or threatened, to "accomplish their purpose, it is difficult to "point out with clearness the illegal means "or end which makes the combination an un-"lawful conspiracy, for it is generally lawful "for the combiners to withdraw their inter-"course and its benefits from any person and "to announce their intention of doing so, "and it is equally lawful for the others, of "their own motion, to do that which the com-"biners seek to compel them to do. Such "combinations are said to be unlawful con-"spiracies, though the acts in themselves and "considered singly, are innocent, *when the "acts are done with malice, i. e., with the in-"tention to injure another without lawful "excuse.*"

In *Vegelahn* v. *Guntner, supra,* at page 98, Justice Allen said:

> "A combination among persons merely to "regulate their own conduct is within allow-"able competition, and is lawful, *although "others may be indirectly affected thereby.* "But a combination to do injurious acts, *ex-"pressly directed to another,* by way of in-"timidation or constraint, either of himself "or of persons employed or seeking to be "employed by him, is outside of allowable "competition, and is unlawful."

In *Purvis* v. *Local No. 500, supra,* at page 358, the Court said:

> "As already stated, of the demands in "themselves the appellees could not be heard "to complain. The appellants contend that "they are made for the benefit of the mem-"bers of their union. This is undoubtedly

"so, and if the injury resulting from a dis-
"regard of them is confined to its members,
"they alone can complain; and even if injury
"incidentally results to outsiders, through
"compliance by the members of the union
"with its rules and orders, there may be no
"remedy for it. An agreement by those to
"be benefited by it, that they will themselves
"observe its terms in accepting employment,
"even if employers be incidentally em-
"barrassed thereby, can occasion no injury
"to employers which the law will recognize,
"for workmen, whether bound by a compact
"among themselves or not, have the absolute
"right to give their services to whom they
"please, or to withhold them from whom they
"please, without responsibility for conse-
"quences to employers or to any one else.
"But this is not the case when the primary
"purpose is to unlawfully coerce others that,
"as a result of the coercion, benefits may ac-
"crue to those who coerce."

In *Erdman* v. *Mitchell*, another Pennsylvania case, above cited, the Court said, at page 89:

"We do not question that defendants may,
"under their constitution and rules, resolve
"that they will not work with members of
"other organizations, or with non-union men
"and act accordingly; that is their right, and
"their organization, when the conduct of its
"members is limited to refraining from work
"themselves according to such resolution, is
"not unlawful."

In *Quinn* v. *Leatham*, *supra*, Lord Shand, referring to *Allen* v. *Flood*, said, at page 512:

"In that case I expressed my opinion that
"while combination of different persons in
"pursuit of a trade object was lawful, al-
"though resulting in such injury to others,

"as may be caused by legitimate competition "in labor, yet that combination for no such "object, *but in pursuit merely of a malicious "purpose to injure another*, would be clearly "unlawful; and, having considered the argu- "ments in this case, my opinion has only "been confirmed."

Again, at page 514, his Lordship continued:

"As to the vital distinction between *Allen* "v. *Flood* and the present case, it may be "stated in a single sentence. In *Allen* v. "*Flood*, the purpose of the defendant was by "the acts complained of, to promote his own "trade interest, which it was held he was en- "titled to do, although injurious to his com- "petitors, whereas in the present case, while "it is clear there was combination, the pur- "pose of the defendants was *'to injure the "'plaintiff in his trade as distinguished from "'the intention of legitimately advancing "'their own interest.'*"

In the *Mogul* case, Lord Hannen said (p. 58):

"The question, however, raised for our con- "sideration in this case is whether a person "who has suffered loss in his business by "the joint action of those who have entered "into such an agreement, can recover dam- "ages from them for the injury so sustained. "In considering this question it is necessary "to determine upon the evidence what was "the object of the agreement between the de- "fendants and what were the means by which "they sought to attain that object. It ap- "pears to me that their object was to secure "to themselves the benefit of the carrying "trade from certain points."

And, continuing on page 59:

"I consider that a different case would "have arisen if the evidence had shown that

> "the object of the defendants was a ma-
> "licious one, namely, to injure the plaintiffs
> "whether they, the defendants, should be
> "benefited or not."

In *Parkinson* v. *Building Trades Council et al., supra,* the substance of the decision is stated in a head note as follows:

> "Laboring men and labor unions formed by
> "them, if not bound by any contract to con-
> "tinue work, and not forbidden by statute,
> "and who use no unlawful means, may law-
> "fully combine for their own protection, and
> "may pledge themselves not to work for any
> "employer of 'non-union' men and *not to*
> *"handle any material supplied by the em-*
> *"ployer,* and not to work for any contractor
> "dealing with the employer."

It not appearing that any of the defendants in making the various agreements set out in the bill even so much as had the complainants in mind, there is no foundation for charging the defendants with forming a combination for the malicious purpose of injuring the complainants.

As appears above in *Curran* v. *Galen, supra,* this language was approved:

> "A combination for the purpose of in-
> "juring another is a combination of a dif-
> "ferent nature directed *personally against*
> *"the party to be injured."*

Also in *Vegelahn* v. *Guntner, supra,* the Court said:

> "But a combination to do injurious acts,
> "*expressly directed to another,* by way of
> "intimidation or restraint, either of himself
> "or of persons employed or seeking to be
> "employed by him, is outside of allowable
> "competition—and is unlawful."

It does not appear here that any act has been done by any of the defendants directed personally against any of the complainants. No one has ever told them that they could not carry on their several businesses if they did not unionize their mills. *None of the defendants have set themselves about trying to prevent the complainants from selling their respective products.* There has never been any personal contest so far as appears between any of the defendants and the complainants. It does not even appear that the names of any of the complainants have ever been placed upon the so-called "unfair lists." The only respect in which the complainants have been injured arises from the refusal of the Brotherhood of Carpenters to work upon their material. *The bill does not charge the Master Carpenters with conspiracy. They are expressly excepted from that charge* (Compl., par. 25).

3. *There is no combination among the defendants to restrain trade.*

The complainants, having utterly failed to prove that the defendants or any group of them harbored a malicious motive to do them injury, have retreated to the position that the defendants at any rate have made agreements which restrain trade, and that therefore the complainants are entitled to injunctive relief. Our view is that a combination formed with the intent to interfere with the interstate trade of others is in violation of the statute, but that in order that a private litigant would have a cause of action he would have to show that the combination was directed against him. However, we contend that there is in fact no combination among the defendants to restrain trade at all.

In the first place, the agreement among the labor defendants not to work upon non-union trim has not in and of itself any tendency to restrain the sale of trim. It might be carried out in every particular and the sale of trim not at all interfered with. If those who bought trim to erect in the City of New York were indifferent as to whether they employed members of the Brotherhood of Carpenters or not, it would not affect competition or the sale of the complainants' trim or the trim of any other shop. If all those who were naturally competitors in the trim business in the City of New York ran union shops, the agreement would not in any way affect trade in trim. Whether it affects competition in trim or not is determined as much by what parties, acting freely, outside of the agreement do as by what the parties to the agreements do. The agreements in themselves are not of a character to restrain trade, such, for instance, as the agreement which was condemned in *Addyston Pile & Steel Co.* v. *United States* (175 U. S. 211).

Nor has this case any resemblance to those cases that have been decided by this Court, where, though there was no express agreement among the parties to restrain trade yet there were sufficient facts from which a scheme, or plan of the combination could be inferred to restrain trade for the benefit of the parties to the plan, such as the *Standard Oil case* (221 U. S. 1) and the *American Tobacco Co. case* (221 U. S. 106). Here it is not the purpose of the members of the Brotherhood to restrain trade in trim. It would not inure to their benefit. Nor are they interested whether trim is sold at a high or a low price, or whether there are few or many competitors in New York City. It is to their interest, however, and it is undoubtedly their object that as

many of those competitors be induced to run union shops as possible; and, so far as the Manufacturing Woodworkers are concerned, the more successful the union is in unionizing shops, the more shops there will be on whose material the members of the Union will work; so that the agreement has no tendency and is wholly insufficient to protect the Manufacturing Woodworkers against competition.

There is another observation to be made. It is said that the union mills have a monopoly of the business of selling trim in the City of New York; but it is a strange sort of monopoly to which all are admitted upon the same conditions, the complainants as well as others, and the parties to which monopoly are all of them in competition one with another.

The complainants admit, as of course they must, that it is not the ultimate object of the defendants or any group of them to restrain competition, but that the ultimate object is to benefit the union by increasing its numbers and getting work for its men. They say, however, this ultimate lawful object is to be attained through an immediate unlawful object—the restraint of competition. It is submitted that this is not true; that the immediate object of the by-law is to make the materials coming from union mills more acceptable to buyers than those coming from non-union mills on account of the fact that the members of the union will work on them. Why is not such an element legitimate in competition? The union mills and the members of the unions have an interest in the increase of the sale of their joint products. If the members of the union can bestow their labor in such a way as to increase the sale of such joint products, even at a higher price than the products of non-union mills

bring, why should they not do so? Is it not all a matter of competition? Because the advantage to the buyer of purchasing union trim, on account of the numerical strength of the union, may outweigh any advantage the complainants can offer on account of lower prices, does that fact make the inducement, which the union mill owners and employees offer, unlawful? Competition is not prevented or in the least affected. The competition of the non-union mills is always present. Any time that a lower price or other advantages that the non-union mills can offer outweighs the advantages offered by the union mills, the buyer will purchase the non-union material. Simply because the complainants are not willing to meet the present competition does not mean that competition is prevented by the defendants. Competition is not wholly a matter of price, nor has the law undertaken to say that no element can be used by one competitor against another competitor except one that tends to lower prices.

The complainants substantially concede that this argument would be sound, were it not for the fact that it requires the aid of the outside carpenter to aid the sale of the union trim. At page 67 of the appellants' brief, it is said:

> "The union manufacturers and their em-
> "ployees have an undoubted interest in ex-
> "tending the sale and use of any merchan-
> "dise which is produced by their joint efforts,
> "and may therefore justify and excuse any
> "injury which they inflict upon their com-
> "petitors by the ordinary methods of legiti-
> "mate competition. They cannot, however,
> "by association or combination with journey-
> "men who have no such interest, but exercise
> " a despotic control over the use and installa-

> "tion of such products, destroy the competi-
> "tion of business rivals and monopolize the
> "market."

If there were two unions here, the members of one working exclusively in mills, and the members of the other working exclusively on buildings in erecting trim, a question might be raised as to how far the members of the union who work upon buildings could aid the members of the union working in shops. But such is not the case. There is but one union, the members of which have regarded their interests as mutual. Ordinarily men who join together for mutual benefit would surely have a large discretion as to how far their interests were mutual, and ordinarily it would not be for an outsider to point out to them in what respect their interests were not mutual. Surely, there is nothing in this case to show why the outside carpenters desire to exercise a "despotic control over the use and installation" of trim if it is a matter in which they have no interest. The evidence clearly shows why all the members of the union regard their interests as the same. The men to a very large extent work indifferently both upon buildings and in shops. If they cannot get a job on a building they take it in a shop; and if they run out of a job in a shop they will take one on a building. They work in shops or on buildings as circumstances and their interests direct (Neal, p. 2418; Brown, 2460-2461, 2463; Huber, pp. 2063, 2074-2075).

POINT II.—The injunctive remedy provided by the Federal Anti-Trust Act at the time this suit was commenced being available to the Government only, the complainants were not entitled thereto.

Nat'l Fireproofing Co. vs. *Mason Builders' Ass'n* (169 Fed. Rep. 259, 263).

Minnesota vs. *Northern Securities Co.* (194 U. S. 48).

POINT III.—The Act of Congress approved October 15, 1914, entitled, "An Act to supplement existing laws against unlawful restraint and monopolies and for other purposes," does not aid the complainants in their claim for injunctive relief.

1. *Because there is no combination directed against the complainants.*

The section of the Act in question relied upon by the complainants is Section 16, as follows:

> "That any person, firm, corporation or "association shall be entitled to sue for and "have injunctive relief in any court of the "United States having jurisdiction over the "parties against threatened loss or damage "by a violation of the anti-trust laws, in- "cluding sections two, three, seven and eight "of this Act, *when and under the same con-*

> *"ditions and principles as injunctive relief "against threatened conduct that will cause "loss or damage is granted by courts of "equity under the rules governing such pro- "ceedings."*

We pass the question here as to whether there is any combination to restrain trade and consider simply the question whether in any event the complainants are entitled to the injunctive remedy.

Courts of equity have not issued restraining orders at the instance of private individuals for the purpose of correcting general economic conditions. Such, however, is what the complainants seek here. None of them ever undertook to erect any trim in the City of New York. Three of them apparently have sold trim (Bristol Door Co., Gould and Paine, see *post*, Appendix VI) to third persons which the journeymen carpenters have refused to erect in the City of New York. Six of them have sold trim in the City of New York (Appellts.' Brief, pp. 41-63), but two of them, Lotham Cypress Co. and Curtiss & Yale Co., as it is put in the appellants' brief (p. 63), "rely primarily upon the proposition that they are prepared and equipped to supply this metropolitan market with the products of their mills." In the absence of any specific attack directed against any of the complainants, such a proposition is in reality what all rely upon.

Judge Mayer in his opinion rendered in the District Court (p. 2895), said:

> "Of the many cases cited, I find none au- "thoritative where a general business situa- "tion in the case of employers or a general "trade situation in the case of employees was "corrected by injunction at the instance of "private suitors."

Would the Court have disorganized the Standard Oil Company on the complaint of a private suitor? It might have enjoined under the present law particular acts directed against such suitor. So might the Court here (provided always there existed a combination in restraint of trade), but what the complainants are asking is a general reconstruction of economic conditions.

2. *Because Sections 6 and 20 of the Act in question provide that such a restraining order as the complainants demand shall not be granted.*

> Section 6 provides "That the labor of a human being is not a commodity or article of "commerce. Nothing contained in the anti-"trust laws shall be construed to forbid the "existence and operation of labor, agricul-"tural, or horticultural organizations insti-"tuted for the purposes of mutual help and "not having capital stock or conducted for "profit, or to forbid or restrain individual "members of such organizations from law-"fully carrying out the legitimate objects "thereof; nor shall such organizations, or the "members thereof, be held or construed to be "illegal combinations or conspiracies in re-"straint of trade under the anti-trust laws."
>
> Section 20 provides: "That no restraining "order or injunction shall be granted by any "court of the United States or a judge or "judges thereof in any case between an em-"ployer and employees, or between em-"ployers and employees, or between em-"ployees or between persons employed and "persons seek employment, involving, or "growing out of, a dispute concerning "terms or conditions of employment, un-"less necessary to prevent irreparable in-"jury to property or to a property right of "the party making the application, for which

"injury there is no adequate remedy at law,
"and such property or property right must
"be described with particularity in the ap-
"plication, which must be in writing and
"sworn to by the applicant or by his agent or
"attorney.

"And no such restraining order or injunc-
"tion shall prohibit any person or persons,
"whether singly or in concert, from termi-
"nating any relation of employment, or from
"ceasing to perform any work or labor, or
"from recommending, advising or persuad-
"ing others, by peaceful means, so to do; or
"from attending at any place where any such
"person or persons may lawfully be for the
"purpose of peaceably obtaining or commu-
"nicating information, or from peaceably
"persuading any person to work or to ab-
"stain from working, or from ceasing to pa-
"tronize or to employ any party to such dis-
"pute, or from recommending, advising or
"persuading others by peaceful and lawful
"means so to do; or from paying or giving
"to, or withholding from, any person engaged
"in such dispute, any strike benefits or other
"moneys or things of value; or from peace-
"ably assembling in a lawful manner and
"for lawful purposes, and from doing any
"act or thing which might lawfully be done
"in the absence of such dispute by any party
"thereto; nor shall any of the acts specified
"in this paragraph be considered or held to
"be in violation of any law of the United
"States."

The suggestion of the complainants that Section 20 does not apply because it applies only to cases between employers and employees, or between employees, and that the case at bar is not an action between employers and employees is not convincing, because it gives too narrow an interpretation

to the words "employers" and "employees." The statute evidently does not mean that the technical relation of master and servant must exist. If it did, it would hardly ever have any application because that relation would ordinarily cease immediately upon the happening of a strike or lockout. When the statute refers to employers and employees, it must be intended to refer to certain classes of persons. The complainants in this action are "employers" and the labor defendants are "employees." Moreover, the second paragraph of the section is in general terms and declares that no restraining order shall prohibit "any person or persons" from ceasing to perform any labor or from recommending or persuading others to cease to perform labor, or from attending at any place for the purpose of obtaining or communicating any information, or from persuading any person to abstain from working. It would seem that this prohibition covers the main relief prayed for by the complainants.

POINT IV.—The defendants have not violated the New York State Anti-Trust Law, nor in any event are the complainants entitled to the injunctive relief given by that statute.

1. *The defendants have not violated the provision of the New York State statute against monopolies for the same reasons that they have not violated the Federal Anti-Trust Act hereinbefore considered.*

2. *The injunctive remedy provided by the statute is available only to the Attorney General.*

The Act itself (General Business Law of the State of New York, Section 351) inflicts a penalty to punish the making of the contracts and combinations condemned by the act, and expressly provides for the restraining of the carrying out of such agreements and combinations by an action to be brought by the Attorney General.

This was the view taken by Judge Noyes in National Fireproofing Company against Mason Builders' Association (*supra*) page 264.

POINT V.—None of the agreements set forth in the bill, nor any act shown in connection therewith, are in hostility to the penal statute of the State of New York forbidding any combination to do any act injurious to trade or commerce, nor does such statute give to a private litigant any rights unless he has shown that the combination was directed specifically against him.

Section 580 of the Penal Code of the State of New York declares that if two or more persons conspire "to commit any act injurious * * * to trade or commerce * * * each of them is guilty of a misdemeanor." The Court of Appeals of the State of New York has several times held that a combination to restrain competition is an act injurious to trade or commerce. But it is submitted

that the argument that has been presented to show that the Federal Anti-Trust Statute has not been violated shows also that this statute has not been violated. Moreover, the Court of Appeals of the State has held that in order that the combiners shall be liable in an action brought by a private suitor under this provision of the Code, it must be shown that they contemplated discriminating against the particular party who claims to be injured.

Kellogg vs. *Sowerby* (190 N. Y. 370).

In this case the Court of Appeals reversed a judgment in favor of the plaintiff on the ground that the defendants were not permitted to show that the combination was not directed against the plaintiff. This criminal statute really has nothing to do with this controversy. It did not make that a tort which was not a tort before it was passed, for it has always been the law that if one could show that a combination in undue restraint of trade was directed against him to injure his business he would have his remedy.

POINT VI.—Upon the whole case, we submit the following:

1. That neither the agreements between the various defendants nor any facts or circumstances shown in connection therewith constitute an undue restraint of trade in hostility to any statute, Federal or State, or in hostility to any rule or principle of the common law.

2. That there is nothing in the nature of an attack being carried on directed against any of the complainants.

3. That equity will not undertake on the complaint of a private suitor to reconstruct general competitive conditions.

Respectfully submitted,

FREDERICK HULSE,
Solicitor and of Counsel for Defendants-Appellees, Members Manufacturing Woodworkers' Association and Master Carpenters' Association.

APPENDIX.

THE TESTIMONY.*

I.

Testimony of officers of complainant corporations.

This testimony in the main is to the effect that the complainants run so-called "open shops" and that some persons unknown, representing themselves to be members of the Brotherhood of Carpenters, shortly before this action was commenced inquired of such officers whether they would employ union men in their respective shops.

Nathan Paine testified that he was Vice-President of the Paine Lumber Company (p. 1595); that that company manufactures trim (1596); that

* As before suggested, we do not think that any fair idea of the testimony can be obtained from the appellants' statements of the case; and further, we are constrained to say that not infrequently an entirely false impression is created by the statements of appellants. To give a single instance: At the top of page 30 of appellants' brief it is said: "The Manufacturing Woodworkers who operate union shops and are the beneficiaries of this boycott are unquestionably active in stirring up strikes against open shop material in order to secure the business for themselves." Again at the bottom of the same page is found this: "It appears that the union manufacturers are goading the union to strike the non-union material (1262). It would be supposed from such unqualified statements that the evidence was clear that the defendants, Manufacturing Woodworkers, had insisted on the union's striking wherever non-union material was used. Such is most assuredly not the case. So far as appears no Manufacturing Woodworker, defendant herein, ever asked any representative of labor to call a strike on any job, nor ever had any communication either oral or written, directly or indirectly, with any union member concerning any strike whatever. The sole ground for the statement in the brief is the following from the testimony of one Schwarz whose job the union had

two-thirds of the men they employ are carpenters and woodworkers (1598); that the company operates an open shop (1598); that the company produces and sells two and one-half millions in mill work (1599); that the difference in wages in Oshkosh and New York is from twenty cents to fifty cents per hour (1641), and that the complaint which the witness has against the defendants is that the complainants have made agreements in question and have lived up to them.

In a letter of November 28, 1910, the witness pointed out (p. 1683) that the combination complained of was that the boycott was "directed in the abstract against non-union material in place of being directed against the individual or firm named."

Charles Neritt testified that he was treasurer of the Paine Lumber Company (1886); that a committee of three called upon him about February 1st, 1911, stating that they represented the Carpenters' Union and wanted the Paine Lumber Company to put union labels on its goods; that Hoeppner was spokesman; that he said it would be advantageous to put union labels on the goods, because otherwise the company would have trouble

struck (p. 1262): "Now did you have any talk with Dhuy [a business agent] at the time when he called this strike? I told him, I asked him why he should call a strike. He said certain manufacturers keep on writing to the unions (that belongs to the unions) and he said they can't ignore it." Of course, this no evidence that any of the defendants, Manufacturers, wrote to the union about anything. Yet it is the only foundation in the whole of this great record for the statement that the Manufacturing Woodworkers are "unquestionably" active in "stirring up strikes" and are "goading" the unions to strike. The appellants' statement of the evidence is full of statements that are no better sustained. Frequently strong and more or less figurative language is used to paint a picture that has no foundation in fact.

selling their goods; that their organization covered the whole country; that there would be no strikes; that the union would operate in a different way (1887-1888); that if the company did not put union labels on it would not be able to sell its products as readily as if it had a label on (1888), and that Hoeppner was a carpenter working for Brand & Son of Oshkosh at the time the testimony was taken (1890).

No authority was shown whereby Hoeppner and the others represented the union (1890-1893).

C. C. Curtiss testified that he was secretary, treasurer and general manager of the Curtiss & Yale Company (1730); that the principal place of business of that company was at Wassau, Wisconsin (1731); that that company had $650,000 invested in the business (1731), and that its sales amounted to one and one-half millions a year (1732).

J. E. Morgan testified that he was president of the Morgan Company (1758); that that company had more than a million dollars invested in the mill business (1759); that in January, 1911, Hoeppner, Bunke and Ranke, representing themselves as coming from the union, asked whether his company would unionize its shop, pointing out that if it (the company) did unionize its shop it would be in a position to market goods in New York; that it was now barred from that market; that the company might expect in the near future to be barred from other markets, the delegation especially mentioning Philadelphia and Boston, and that the company would be barred from other markets because union men would refuse to put up their goods, being non-

union made. The witness told these men that he would not unionize (1761-1762). He further testified that he was not acquainted with these men (1781).

The witness further said that the sales of the company amounted to one and a quarter millions yearly (1762); that he complained of business dropping off about September 1st, 1910 (1774); that the company employed carpenters—350 men, 150 boys and 30 women and girls (1780); that Bunke and the others who saw him reside in Oshkosh and that he did not try to find out where they worked or where they came from (1792-1793).

Finally he said that the trim manufactured by this mill could not be distinguished by ordinary men from that made by any other mill (1796).

J. G. Morris testified that he was president and manager of the McMillen Company (1833); that their shops were at Oshkosh, Wisconsin (1833); that that company manufactured sash, doors and trim (1833); that its investment was $250,000; that it employed from 300 to 350 men—285 carpenters and wood workers—and that the company operates an open shop (1834); that in January, 1911, three men representing themselves to be a committee from the local union, called on witness stating that they came with a view to ascertaining whether the company would be willing to unionize its factory; that they suggested that it might help the company to dispose of its products; that they did not say in what way it would help to dispose of the company's products and that he told them that the company would not think of doing such a thing (1834-1836).

He further said that the annual sales of the com-

pany amounted to $750,000 a year (1836); that the company received from the Iroquois Door Company the letter of October 15th, 1910, saying that it was necessary for the latter company to cancel all unfilled orders for New York City on account of the union situation (1839-1840); that Phinney of the Iroquois Door Company said that he feared he would be unable to use company's doors on account of position of union (1841); that working hours at company's mill were ten hours a day, the wages from ten to forty cents per hour (1855-1856) and that the company was not a charitable institution (1869).

T. B. Waters testified that he was treasurer of the Lotham Cypress Company of Oshkosh, Wisconsin (1874); that that company had $300,000 invested in the business (1875), that the company employs from 215 to 240 hands; that the company runs an open shop (1875); that its business amounts to $700,000 per annum (1876); that a customer by the name of Edmonds said that he could not use material because made in non-union shop (1878); and that the wages paid by the company is 18½ to 25 cents an hour with a working day of ten hours (1885).

Harry G. Gould testified that he was secretary of the Gould Manufacturing Company of Oshkosh (1894); that that company had $350,000 invested in the mill business; that it employed about 150 hands—12 carpenters and 138 wood workers; that it ran an open shop (1895); that on January 30, 1911, three representatives (witness knows no names) asked if company would consider turning works into union shop; that witness answered that

the company would not consider such a proposition; that committee visited pleasantly for half an hour, saying that company would have less trouble in disposing of goods if it used union label (1895-1897).

The witness further said that the annual sales of the company were $450,000 (1897); that an ordinary workman could not tell the trim from this mill from the trim from other mills and that on January 2nd, 1911, Parshelsky Brothers (Plff.'s Ex. 5, p. 1936), wrote in part as follows: "From the start we were led to believe that by obtaining this injunction *you were going to compel us to use the sash*, but they absolutely pay no attention to same."

George Wesley Crooks testified that he was secretary of Crooks & Son (p. 950); that that company operated an open shop (951) employing about 100 men; that its shop was located at Williamsport, Pennsylvania (951); that that company had sold trim in New York City, but had sold none after first six months of 1910 (953); that one Cook came to see him at his office in Williamsport, Pennsylvania (955), telling him that if the company would unionize the shop it could get more business than it could turn out, but that if it did not it could not put a dollar's worth of material into New York market (955-956, 979-987, 993-996, 1025, 1027-1037, 1039, 1051-1052), and that this conversation took place in the spring of 1910 (956).

The witness further mentions various persons to whom he tried to sell doors in New York City and said they could not buy because his was an open shop (957-961), and that Cook said they were en-

deavoring to organize the territory between New York and Washington (994).

William O. Came testified that he was president of the Bristol Door and Lumber Company; that that company manufactures doors, sash, trim and other mill work at Bristol, Virginia; that its investment is from $125,000 to $150,000 (1998); that it employs 50 men; that it operates an open shop; that its products are valued at about $250,000 per annum; that 75 to 90 per cent. of its products are sold outside of Virginia (1999); that New York agent is O. L. Worden (1999); that the company has had local agent in New York for four years; and that it went there in 1906 or 1907.

The witness then proceeds to give the amount of business done with three New York customers in 1910 and to state that the company did not do any business with them in 1911.

A letter was put in evidence through this witness from the Empire Door and Trim Company (Exhibit 1, Bristol, p. 2003) to witness suggesting that witness have an interview with the National agent, Cook, because if the Bristol Company could "get together" with "these people" it would greatly increase our business (2003-2004).

A telegram from the Empire Door and Trim Company (Ex. 2, Bristol, p. 2005), dated November 5, 1910, was also put in evidence, in which the Empire Door and Trim Company directed the Bristol Company to stop work on all orders.

A letter (Ex. 3, Bristol, p. 2006) from the Empire Door and Trim Company was also put in evidence, dated November 4, 1910, to the same effect as the telegram and stating that Bristol

Company's material could not be used in New York City.

The witness further testified that he had a talk with Biggart of the Empire Door and Trim Company, who said that the reason why his company could not do business with the Bristol Company was because the latter company ran an open shop (2007).

The witness further testified that the Bristol Company pays from 10 to 35 cents per hour to its employees; that a very few receive 35 cents per hour; that the average wage of the 50 men is 17½ cents an hour, ten hours a day, 6 days a week (2008-2009); that the Bristol Company does not unionize because it would be more expensive to run its shop and that it has never been approached by any union representative (2009-2010). He also testified (p. 2017):

> "Q. You have never had any difference "with them [the union mechanics] that "would lead to any malice against you? A. "Not that I know of.
>
> "Q. That is, it is not a conspiracy against "you, it is a conspiracy against all non-"union mills; is that your idea? A. It looks "to me as if it is a conspiracy against my "goods.
>
> "Q. Isn't it only because your goods are "non-union? A. So far as I know.
>
> "Q. Not because they are made by you? "A. Not as far as I know."

II.

Labor Union Officers called.

The Secretary of the Building Trades Council, a local organization, and the National President and Secretary of the Brotherhood of Carpenters were called to testify as to the relation of certain organizations and to verify certain records showing the action taken at various general conventions of the Brotherhood. The records verified tend to show the general purpose of the union members not to work on non-union material.

Roswell D. Tompkins testified that he was Secretary of the Building Trades Council (1298); that the Building Trades Council holds its charter from the Building Trades Department of the American Federation of Labor (1298); that the Building Trades Council is composed of 37 different unions in the various trades; that the Carpenters' District Council of Greater New York is connected therewith (1298); that the Building Trades Council was formed January 12, 1909 (1299); that the membership of unions in New York varies from 65,000 to 90,000 (1301); that the membership of the Carpenters' Union varies from 20,000 to 22,000 (1301); that Kelso, Blumenberg, Erickson, Bausher and Towers were representatives of the carpenters in the Building Trades Council during the first six months of 1911 (1302); that Complainants' Exhibit 36 is the constitution of the Building Trades Council (1302); that the United Board of Business Agents was connected in some way with the Building Trades Council in the spring of 1911; that

French and Kelso were on the United Board of Business Agents for the carpenters (1303) and continue so up to date; that Complainants' Exhibit 37 is the constitution of the United Board of Business Agents (1303); that the various unions elect representatives to the Building Trades Council (1308); that sympathetic strikes are only called through the Board of Business Agents (1325); that no complaint has been filed against any of complainants (1326); that the Board of Business Agents orders strikes and that only the Business Agents of the trades on the job act in such cases (1326, 1332). The witness explains how strikes are called (1326-1328).

The witness further said that the using of non-union trim was not a ground for the strike of the different trades being called (1336); that strikes were only called as provided in the rules (1341); that no sympathetic strike was called for the Rector job (1343), nor on the Cathederal of St. John the Divine (1343).

John Wolfinger testified that he was an organizer of the United Brotherhood of Carpenters (1562); that the headquarters of the National Organization was at Indianapolis (1562); that there were 1,900 locals; that the membership of the organization was about 200,000; that the Joint District Council of New York was made up of the local unions of New York and vicinity; that there were seventy New York locals; that the locals elect representatives which make up the Joint District Council; that the headquarters of the Joint District Council of New York was 142 East Fifty-ninth Street; that in Brooklyn there was a Borough Committee, which is part of the Joint District Council (1563); that

Complainants' Exhibit 38 contains the by-laws of the Joint District Council (1565); that Neal is the Secretary of the Joint District Council, and has been for two years; that Heinens, a business agent, and witness, called on Newton Company in August, 1910 (1571); that they saw Mr. Newton, presenting to him an agreement requesting him to sign same (1572); that the agreement marked "Complainants' Exhibit 39" (1572, printed 1573) is the agreement they asked him to sign; that Mr. Newton ultimately refused to sign same (1572).

William D. Huber testified that he was President of the United Brotherhood of Carpenters and had been for twelve years (2051); that the Constitution contains a provision: "It shall be the duty of all district councils and local unions to promote the use of the trim and shop made carpenter work bearing this label, and wherever possible to prevent the members under their jurisdiction from encouraging the use of 'unfair' material by handling the same." That this provision became part of the constitution in 1908 (2052); that it was submitted to a referendum vote in 1904 (2052); that the Brotherhood has general organizers and local organizers employed directly by the National organization; that these organizers are under the President's control, to whom they report and whom he instructs when necessary (2053), but in general the President simply sends an organizer to the locality and such organizer uses his own best judgment when he gets there; that the organizer is sent to build up the organization (2054); that during part of the year 1910, John Wright, Harry Cook, William Simpson, Bryne, John Wolfinger, were working in New York and vicinity (2054); that Fred Bush, Carl Young

and Arthur Quinn were in New York for a little while (2055); that George Murray is an organizer in Greenwich, Connecticut; that George Bausher was secretary of the General Executive Board for 1911 (2057); that 40,000 or 50,000 members of the Brotherhood are mill workers out of 200,000; that when an organizer enters into an agreement with a mill as to employing union labor, such agreement goes to the President in some instances (2059).

The witness further said that the carpenters' trade is only one trade; that a good carpenter can do any class of carpenter work (2063); that when a man gets old he naturally goes into mill work; that a young man is likely to start in at mill work (2065, 2067, 2088); that the union tries to have a man an all around mechanic so he can do any class of work (2068); that a woodworker is a carpenter, and *vice versa* (2070); that the Brotherhood from time to time makes appropriations to assist local unions (2070) in strikes and lockouts (2071), and some of the money has been appropriated from time to time for New York; that Daniel Featherstone is a general organizer in the South (2071), likewise George A. Bohnen (2071).

The witness further testified that the District Councils have local authority (2071); that the matter of agreement with employers in New York is left to the District Council and organizers in that locality (2072); that any carpenter of qualified skill and good health may become a member of the union (2079), but this must be by a two-third vote of the union (2083); that Exhibit 1-A (2081) is a copy of the by-laws of the National Brotherhood of Carpenters and Joiners; that Section 235 relative to trim (2081) is as it was amended in 1910 (2082).

Frank Duffy testified that he had been general secretary of the Brotherhood since July 21, 1901 (2095). He produced the proceedings of the National Conventions of the Brotherhood for the years 1904, 1906, 1908 and 1910 (2095). He said that the organization publishes the *Carpenter* (2095); that it publishes about 80,000 copies a month (2095). He said also that the *Carpenter* is published for the local unions (2097). Extracts from the *Carpenter* are printed in the record giving the names of the Business Agents in this vicinity from August, 1906, to February, 1911 (2115-2129). A large number of extracts for several years back are taken from the *Carpenter* (2131-2145), and a large number of extracts from proceedings of the various conventions likewise (2166-2224). *All of these extracts tend to show the purpose of the members of the union not to work upon non-union trim.* A few of the extracts will show the general nature thereof.

From *The Carpenter* for September, 1910.

Page 22.

From an article by William D. Huber, President of the United Brotherhood, entitled, "The Fight in the Courts for the Open Shop and Anti-Boycott":

> "Probably the membership, or at least a "part of them, do not realize it that every "injunction that is filed against organized "labor is for the sole purpose of obtaining for "the employer the official and judicial con-"firmation of the court of the open shop doc-"trine. Show me an injunction granted and "I will show you one more link forged in the "chain of open shop dogma" (2130).

From *The Carpenter* for February, 1909.

Page 24.

From report of George J. Bohnen, as organizer for the United Brotherhood:

> "All these agreements provide for union "trim and mill work exclusively. This, in "turn, did more than all other agencies to "defeat the Master Carpenters in their con- "tinuous attempt to force this organization "into a non-union trim and mill work agree- "ment and thereby establish scab conditions "and open shop. As a further result of this "action we have succeeded in having con- "tracts for trim aggregating nearly one mil- "lion dollars in value placed with union "shops and mills working eight hours and "paying the prevailing shop wage of New "York City, which is fifty cents per hour; "and further, we have organized, as a direct "result of this agitation, a number of impor- "tant mills and shops, among which are the "Pinches Co., New Britain, Conn.; J. Mor- "ganthalor & Sons, New York City; Hyde- "Murphy Co., Ridgeway, Pa.; Waters & "Osborn, Red Bank, N. J.; J. Marcus Wood- "working Co., Williamsbridge, New York; "Standard Lumber & Trim Co., Charlestown, "W. Va.; McConnell Mfg. Co., Hornell, "N. Y., and the end is not yet" (2131).

From *The Carpenter* for March, 1910.

Page 10.

From an editorial:

> "Where there is a will, there is a way. No "court of judiciary can compel us to buy an "article that is obnoxious to us and the "highest authority in the land cannot compel "us to handle scab material in the buildings. "Let every District Council, Local Union, "Business Agent and individual member see "to it that all interior decorations or build-

"ing trim is union-made and positively bears "our U. B. label. Let every one of us, from "now on, be more conscientious in this mat- "ter; it will have a tendency to convince the "mill owners that it is advantageous for "them to establish union conditions in their "mills, to enter into an agreement with our "organization and apply for our label. The "only but simple solution of the millmen "problem lies in the refusal to handle non- "union materials and the booming of our "U. B. Label" (2132).

From *The Carpenter* for July, 1907.

Page 19.

From the report of Organizer H. L. Cook:

"I again left for St. Louis, Mo., where I "have been endeavoring to thoroughly organ- "ize the mill men. It is hardly necessary "to state that this is a hard proposition. In- "junction suits, restraining orders, open "shop conditions, and last but not least, "numbers of men willing to work so long as "they can secure a steady job, are almost in- "surmountable obstacles which confront us "in St. Louis. I have found that the employ- "ers do not object to the men belonging to "the organization, but they do object to tell- "ing the men they have to join" (2139).

From *The Carpenter* for July, 1907.

Page 23.

From the report of Organizer W. J. Shields:

"The injunction no longer terrorizes our "membership, as they have the understand- "ing that a connection with a labor move- "ment does not abridge personal liberty, and "with this knowledge they can work or not

"work as circumstance dictates, and with "unfair trim on a job they still have the "right to vacate the job and seek employ- "ment under more congenial conditions. "We, in Boston, have perfected a settlement "with the President of the Manufacturers' "Club, Mr. Gerlach, and the pressure that "forces capitulation was the refusing of our "members to handle the product from his "mill" (2140).

From *The Carpenter* for May, 1911.

Page 21.

OFFICIAL INFORMATION.

Quarterly Report of General President William D. Huber for quarter ending March 31, 1911:

"Indianapolis, Ind., March 31, 1911.

"To the Officers and Members of the Gen- "eral Executive Board, Greeting:

"* * * The organizing work has gone "on with good success considering the condi- "tions throughout the country. Among the "mill men we have been more successful than "we expected. Good work has been done "along that line, and the actions of New "York City on the proposition of not han- "dling non-union material has had the effect "of mills being unionized that was impos- "sible to organize heretofore. May the good "work be kept up until all mills are union- "ized and enjoy the conditions we are striv- "ing for."

* * * * * *

"Fraternally yours,
"WM. D. HUBER,
"General President."
(2143).

From "Proceedings of the Thirteenth General Convention of the United Brotherhood of Carpenters and Joiners of America." Page 45. 1904.

"REPORT OF THE GENERAL SECRETARY."

"This, to us, is a source of satisfaction and "gratification and is an incentive, at the "same time, to carry on the good work of "organization until we have every man "working at the trade within our ranks, be "he carpenter or joiner, stairbuilder, ship-"joiner, millwright, planing mill bench hand, "cabinet maker, car builder, or engaged in "running wood working machinery. In fact, "every man employed in the wood working "industry—handling edged tools—ought to "belong to the United Brotherhood of Car-"penters and Joiners of America" (2166).

From proceedings of the Thirteenth General Convention of the United Brotherhood of Carpenters and Joiners of America, 1904, page 84. Further extract from the report of General Secretary, Frank Duffy:

"TRADE MOVEMENTS—STRIKES AND LOCKOUTS."

"Our unions, in the enforcement of their "local rules—refusal to work with non-union "men and to handle nonunion material—"have, within the past twenty-three years, "spent the sum of $184,776.22. Our district "councils have also spent, during the same "period, for the same or similar purpose, "$715,000.00, making a total in all of $899,-"776.22. The General Office, in support of "trade movements during the same period, "paid out $486,190.47.

"During the last two years the number of "trade movements exceeded that of any "other term. This is what may be expected. "In all 625 cities and towns made demands

"for higher wages, the inauguration of the "eight-hour day, half-holiday Saturday, rec- "ognition of the union, refusal to work "with non-union men, or to handle non- "union manufactured material, and to resist "the 'open shop.' In many instances con- "flicts waged long and bitter between em- "ployer and employees, and feeling ran high, "but with judicious management and timely "support from the General Office, 98 per "cent. of these movements were successful. "So far we have been completely successful "in defeating the 'open shop' policy."

"Open Shop."

"Organized labor has never dealt with a "more serious and important question than "that of the 'open shop.' On the face of it, "to those who know nothing either of trades "unionism, or the trickery of the employers, "it seems fair; yet it is the most dangerous "weapon ever used by the employing class to "bring about the demoralization and com- "plete destruction of organized labor.

"The principles and policy of the 'open "shop' cannot be tolerated for a moment by "this organization. If such a system should "be established in any city, it would mean "the decline and final death of our local "unions in that city. With the unions gone, "wages would soon go down, which is ex- "actly what the employers want and what "they are looking for under the guise of the " 'open shop'.

"On the 'open shop' question there is "nothing to arbitrate. Our unions cannot "consent to arbitrate a question that involves "their very lives. The constitutionality of "our organization has been tested time and "time again in the courts; decisions have "been handed down in our favor by some of the most eminent jurists on the bench.

"We have the right to live and transact our "business in our own way, provided we do "not violate the laws of the land.

"We have been forewarned, especially "during the past year, that we have a hard "fight ahead of us on this question. If such "is the case, we might as well refuse right "now to arbitrate and fight this to a finish "at all costs" (2167-2168).

From Proceedings of the Thirteenth General Convention of the United Brotherhood of Carpenters and Joiners of America, 1904. Page 114. Further extract from report of General Secretary, Frank Duffy:

"RECOMMENDATIONS."

"To summarize, the following recommen- "dations are submitted for your careful con- "sideration:

"1. The formation of an emergency or "defense fund for the support and protec- "tion of our members in strikes and lock- "outs, and to resist the 'open shop' policy; "said fund to be derived from an assess- "ment on all local unions of fifty (50) cents "per member per year, payable in two in- "stallments of twenty-five (25) cents each "in June and December" (2168).

From Proceedings of the Fourteenth Biennial Convention of the United Brotherhood of Carpenters and Joiners of America, 1906. Page 159:

"REPORT OF THE GENERAL SECRETARY."

"TRADE MOVEMENTS, STRIKES AND LOCK-OUTS."

"Two years ago we were face to face with "the 'open shop' proposition. At that time "our organization was the one selected by

"the employers on which the onslaught was "to be made, but thanks to the firm stand "taken by the delegates attending the Mil- "waukee Convention, the 'open shop' has "been a failure, and is now a 'dead issue' "as far as this organization is concerned. "Our local unions and district councils, in "the enforcement of their local rules, refusal "to work with non-union men and to handle "non-union material, in demands for better "conditions, increase in wages and a shorter "work day have spent within the last "twenty-five years the sum of $1,179,776.00. "The General Office in support of trade "movements paid $614,003.89. During the "two years just closed we had fewer strikes "than the previous two years; in fact, many "of these could have been avoided if our "members were not goaded into rebellion "and resistance by the bosses in their de- "termination to cut wages, increase the "hours of toil, settle disputes by compulsory "arbitration and their demand for the elim- "ination of the sympathetic strike alto- "gether. The Milwaukee Convention appro- "priated several amounts to our local unions "and district councils, then on strike; alto- "gether the sum of $127,813.42 has been "spent by the General Office in these move- "ments, detailed account of which will be "found in the report of General Treasurer "Neale" (2196).

From Proceedings of the Fourteenth Biennial Convention of the United Brotherhood of Carpenters and Joiners of America, 1906. Page 184. Further extract from report of General Secretary, Frank Duffy:

"RECOMMENDATIONS."

"Second. Devise ways and means at this "Convention for the formation of an emer- "gency fund, for the protection and defense "of our members, local unions and District

"Councils when dragged into court, or when "enjoined and prohibited from performing "their duties as members of organized labor. "Injunction cases should be carried to the "highest courts in the land, as personal "liberty must be protected at all costs" (2197).

From the Proceedings of the Thirteenth Biennial Convention of the United Brotherhood of Carpenters and Joiners of America, 1906. Page 460:

"COMMITTEE ON GENERAL SECRETARY'S REPORT."

"No. 5, which reads as follows:

"All lawsuits, except in death and dis- "ability claims, should be handled by the "General President in conjunction with the "General Executive Board.

"On this your committee concurs as it "reads, and believes it should be adopted."

* * * * *

Page 462:

"Moved and seconded that the report be "concurred in.

"Carried.

"No. 2, which reads as follows:

"Devise ways and means at this Conven- "tion for the formation of an emergency "fund, for the protection and defense of our "members, Local Unions and District Coun- "cils when dragged into Court, or when en- "joined and prohibited from performing "their duties as members of organized labor. "Injunction cases should be carried to the "highest courts in the land, as personal lib- "erty must be protected at all costs.

"This recommendation we consider one of "the most important of the several from the "fact that many locals have been enjoined "and prosecuted by local and State authori- "ties and consequently prevented from exer-

"cising their American rights as American "citizens. Our opponents declare that they "have a right to hire whom they please, "conduct their business as they please, even "to the extent to proselyting our member- "ship, to all of which we concede, but "demand that inasmuch as the above is con- "ceded as lawful on their part, that we also "have the right to work with whom we "please, and how we please, and where we "please, so long as we do not violate our "local, State or federal laws. Your com- "mittee believes that no large piece of "machinery like the United Brotherhood "of Carpenters and Joiners of America, "composed of over 200,000 men, divided "up into nearly 1,800 locals, each one "being a separate and necessary part, conse- "quently must be protected and defended. "Therefore we recommend such action by "this Convention which will empower the "General Officers to take charge of all such "cases and carry them to the highest courts "in conjunction with the local that may be "involved; providing that immediate notice "and copy of complaint has been sent to the "General Secretary and said local follows "the directions that the General Office may "give. Carried" (2201).

From the Proceedings of the Thirteenth Biennial Convention of the United Brotherhood of Carpenters and Joiners of America, 1906. Page 476.

"The Committee on Organization sub- "mitted the following report:

"To the President and Delegates to the "Fourteenth Convention—Greeting:

"Whereas, The conditions existing in the "mills of the large cities of the country are "seriously handicapped by the unorganized "conditions of mills scattered throughout "the country, and

"Whereas, These unfair mills are continu-

"ally flooding the larger cities that are or-
"ganized with unfair trim, and

"Whereas, As soon as the officers of the
"District Council and union attempt to stop
"the use of this material they are enjoined
"by the courts, and unless these conditions
"are changed it will eventually drive the fair
"mills back to the conditions of the unorgan-
"ized, as they cannot run their mills eight
"hours per day and pay living wages in com-
"petition with these unfair firms; therefore,
"be it

"Resolved, That this Convention establish
"means by which these conditions can be
"changed and protection given to organized
"mills, and that the General President be
"authorized to instruct the organizers to de-
"vote more time to this matter and to keep
"a list of all unfair mills for the benefit of
"the locals and D. C.'s in their districts, and
"further,

"Resolved, That the General President be
"empowered to order sympathetic strikes in
"all trim being used in any part of the coun-
"try made by an unfair firm against whom
"an effort is being made by any local or C.
"D. C.

"Respectfully submitted.

"On the recommendation to have the or-
"ganizer devote more time to the trim ques-
"tion and to keep a list of unfair shops, your
"committee recommends its adoption.

"The latter part has already been covered
"by action taken by this Convention and
"your committee disapproves.

"H. C. FULLER, Chairman
"A. M. WATSON, Secretary
"P. F. MCDONALD.
"JAS. HOPKINS.
"R. SOUTHWELL,
"Committee.

"The standing motion to concur in the re-
"port of the committee was carried" (2202).

III.

Testimony of certain members of the Building Trades Employers' Association.

Two members of the Building Trades Employers' Association were called by the complainants and one by the labor defendants. Their testimony tended to show:

(1) *That it was not practicable to erect buildings in the Borough of Manhattan nor in some parts of the Borough of Brooklyn with non-union labor.*

(2) *That previous to 1903, when the General Arbitration Plan was adopted, the building business, owing to frequent strikes and lockouts, was in such a condition as to render its regular prosecution almost impossible.*

(3) *That the General Arbitration Plan brought about a substantial cessation of strikes and lockouts.*

(4) *That, though the parties no longer proceed under the plan, yet many of the disputed questions were settled during its operation, and disputes which now arise are settled through the arbitration boards provided by the trade agreements, such as the two trade agreements in evidence.*

Otto M. Eidlitz, called by the defendants, members of the Union, testified that he was a mason builder; that he had been president of the Mason

Builders' Association, Chairman of the Board of Governors of that Association, member of the Tenement House Commission, of the Ahearn Investigating Commission, of the Employers' Liability Commission (2509), and further that he was a large builder having recently built, among other buildings, the Bankers' Trust Building (2509). He further testified that he was author of the General Arbitration Plan (2510); that as to the conditions previous to 1903, strikes had become so frequent that it became very irksome to carry on business; that the situation became absolutely impossible; that the various trades were jealous of the work which each claimed a right to do; that this led to frequent strikes with which the employer had nothing to do; that there were also certain lines of affiliation among certain unions so that if one struck it might have sufficient influence to bring about a strike in several others; that before 1903 the sympathetic strike was an every day occurrence (2531); that the builders therefore united into the association known as the Building Trades Employers' Association and brought about the institution known as the General Arbitration Plan; that this plan was in operation for seven years; that it finally was discontinued because of the failure of the unions to expel one of their number from its benefits in accordance with the agreement, but that during the seven years of the existence of the plan many of the disputes which had before caused strikes had been settled; that the decisions of the Board while the plan was in operation are still recognized as binding and that disputes which now arise are settled through the boards of arbitration created by the various trade agreements (2510-2512).

Lewis Harding, called by complainants in rebuttal, testified that he was a member of the Master Carpenters' Association (2535); that he had been a member for twenty-five years; that in his opinion it was not practicable to erect a large building in the Borough of Manhattan except with union men (2536; 2568); that the Board of Governors of the Building Trades Employers' Association was made up of three representatives from each trade association (2572); that the Brotherhood of Carpenters was not a party to the General Arbitration Plan during the last four or five months of the existence of such plan (2574); that previous to 1903 the building business was very uncertain on account of frequent strikes (2575); that the Master Carpenters entered into the trade agreement of 1909 because the carpenters showed that they would live up to the agreement (2576-2579), and that non-union made material is cheaper than union made material (2586).

The testimony also shows that what the witness meant by saying that the master carpenters entered into the trade agreement prohibiting the use of non-union trim in 1909, because the journeymen carpenters showed that they could live up to the agreement, was that theretofore the journeymen carpenters had not themselves consistently lived up to their own by-laws, that they would not work on non-union trim; that is to say, it was found by the Master Carpenters' Association that the journeymen were working for master carpenters not members of the association when the latter were using non-union trim, but that in 1909 the investigations of the Master Carpenters' Association showed that the journeymen were only working for non-members when such non-members used union trim. The

journeymen having brought about this condition, the master carpenters were then willing to enter into the trade agreement in question (2583, 2586, 2603).

Rufus H. Brown, called on behalf of the complainants in rebuttal, testified that he was a Brooklyn builder and member of the Master Carpenters' Association (2606); that it was the Joint District Council that insisted on the clause in the trade agreement which forbids the use of non-union trim, and that that body refused to make agreement unless this clause was put in (2607-2608). The witness further said that all buildings in Manhattan are erected under union conditions (2610), but that non-union trim is largely used throughout the Borough of Brooklyn (2612). The witness also outlines that part of the Borough of Brooklyn where union conditions prevailed (2612-2613).

IV.

Agreements between individuals and the Brotherhood of Carpenters.

Certain individuals were called as witnesses to testify that they had made agreements with local representatives of the Brotherhood of Carpenters substantially to the effect that they would not handle non-union material.

William Biggart testified that he was President and Treasurer of the Empire Door and Trim Company (301); that that company made a trade agree-

ment with the Brotherhood (Complt.'s Ex. 7, p. 303); that witness was willing to enter into the same (309); that the Empire Door and Trim Company had purchased material from the Bristol Door and Lumber Company; that the members of the Brotherhood of Carpenters would not erect it (310); that he met Cook and others with regard to the matter (311); that he removed the material from the job (317-318, 171), and that his own men also struck (313).

The witness also expressed the opinion that Mr. O'Neil, one of the defendants, was largely responsible for his trouble; that he spoke to Mr. O'Neil about the matter; that a few days later Mr. O'Neil told him that he thought there would be no trouble about his working the material over and that he never had any trouble afterward (327-328).

Moritz Arnstein, in addition to the testimony later digested concerning the amount of his purchases from the Paine and Gould companies, testified that he was a dealer in glazed window sash (424); that he made agreement (Complainant's Ex. 9), being an agreement with the Union, that he would only handle sash of union mills (424); that he was told by John Rice that sash for a job at 113th Street and Broadway would have to be union made sash, else the carpenters would not work upon it (428); that he had bought sash for this job from the Gould Manufacturing Company (429); that he consulted Mr. O'Neil (President of the Empire City Gerard Company, a manufacturing woodworking concern) (429-430); that O'Neil did not suggest the agreement which he entered into (430-431); that O'Neil said that he would see the heads of the union (431); that he (the witness) made the agreement to avoid trouble with the unions (436);

that he had an understanding with Cook that all material he had on hand was to be used without further trouble, whether union or non-union (435-436-438).

Thomas C. Edmonds testified that he was in the business of selling glazed window sash (551); that he was president and treasurer of the Thomas C. Edmonds Company (551); that that company made the agreement dated January 12, 1911, with the union (Complainant's Ex. 19), to the effect that the company would not handle non-union sash (552); that before the company made the agreement it did business with Paine, Gould and McMillen (555, 570); that since making the agreement it has not bought of them, for company cannot sell their goods (556, 581).

The witness also testifies as to the circumstances under which the company entered into agreement as follows: That the company had sold customers sash; that the customers were informed that the carpenters would not handle them (557); that the witness made inquiries (558); that he saw O'Neil of the Empire City Gerard Company; that O'Neil said he would have to get in communication with the representatives of the union (559); that he met representatives of the union at O'Neil's office (560); that he met Mr. Cook, representing the union (560), who suggested the agreement (561); that at the time Arnstein, a competitor of his, was present (495); that he at first inquired of the woodworking trade how the matter might be straightened out (558) because his company was in that business (562); that both Cook and Rice were present at the time the agreement was signed (562-563); that there were complaints by customers for a month or

six weeks before the agreement was signed that carpenters would not handle sash (564); that he had a verbal understanding with Rice and Cook that the sash which the Edmonds Company had sold would be hung if the agreement was signed (565); that the sash bought here cost twenty per cent. more than the non-union sash (572); that he had simply called on O'Neil because O'Neil was a friend of his (577-578); that O'Neil took no part in the transactions for the making of the agreement (578) and that Cook and Rice said the men would not handle non-union sash (580).

Nathan Bernstein testified that he was secretary and treasurer of Friedlander & Sons (609). He was apparently called to show that that company had made an agreement with the union, but the witness knew nothing about it (609-610).

Jacob H. Werberlowsky testified that he bought and sold sash (682); that he made an agreement to handle only union sash (Complainant's Ex. 20, p. 684); that it was signed by Simpson & Kelso on behalf of the union (686); that there was a memorandum attached to the agreement to the effect that in consideration of the witness signing the agreement the agreement would "permit you to start the hanging of the glazed sash for the Highwood Rlt. Const. Co.'s job" (Plff.'s Ex. 20-B, 687); that as to the signing of the agreement he had to sign it because Weinstein (who was apparently the Highwood Realty Company, 688), said he could not finish building, threatening he would have to do something else, so witness could do nothing but sign (688); that he does not want to handle union sash because there is nothing in it since they charge

too high for it (690); that he did very little business in sash above 1⅜ inches thick (691-693); that there are more non-union factories in New York than union (695, but see 701-702); that he did not know where the particular material in question on Weinstein's job was bought (696), and that he knows that men can be better controlled when non-union than union (703).

Archibald T. Mackenzie testified that he was secretary of the Van Nest Woodworking Company (495) and Westchester Woodworking Company (496); that he bought more doors of Morgan & Company; that a strike was ordered in their shop August, 1910 (498); that Brotherhood would not allow men to work in their shop if they handled any more non-union material (Complainant's Ex. 11, 498-499); that as secretary of the Van Nest Woodworking Company he entered into agreement with the Brotherhood (Complainant's Ex. 12, p. 500), which in effect is an agreement to comply with the agreement entered into between the Manufacturing Woodworkers and the Brotherhood, attached to the complaint—that at the time of the strike Van Nest Company had $5,000 or $10,000 worth of Morgan & Company's doors; that the carpenters were not called upon to do any work on them (506-507); that the above mentioned agreement was entered into to settle the strike (508); that his understanding was that if a manufacturer operated a union shop he was not expected to purchase non-union material (510-511); that the letter written by him as secretary of the Van Nest Woodworking Company to Morgan Door Compa v, dated August 17, 1910 (Plff.'s Ex. 11, p. 498), was written partly at the request of the delegates (511-512); that doors could

be purchased fifteen per cent. cheaper from non-union than from union concerns (512); that when the men in the mill struck they must have done so voluntarily on being informed by delegates that non-union material was being handled (514), and that the material which was being handled, to which objection was made, was from the Bristol Company and Morgan & Company (513).

V.

Difficulties of selling non-union goods in New York.

The witnesses below enumerated were evidently called for the purpose of showing the difficulty of selling so-called non-union trim in New York City, particularly in the Boroughs of Manhattan and the Bronx.

Frank Humphrey testified that he was an estimator and salesman for H. W. Palens' Sons (225-226); that that company had done business with Crooks & Sons (226); that it ceased to do business with Crooks & Sons because it could not use Crooks & Sons' material in New York market (226-228) on account of not being made under conditions laid down by the union (228), and that Palens' Sons operated a union mill at Kingston, New York (234).

Oliver L. Worden testified that he was a salesman in New York City for the Bristol Door and Lumber Company and others (254); that he can-

not sell any more trim in Manhattan Island because his is not union stuff (256); that he had sold goods to the Empire Door and Trim Company, beginning April, 1910, and continuing to October, 1910; that representatives of that company gave as a reason why they did not buy any more that the unions would not work on the material, and that that company also said that they had one or two carloads of such material which the unions had discovered and would not let the men work on (257). The witness testified substantially the same as to a customer, William Klein (261-265).

James C. Miner testified that he was a salesman for McMillen Company (447); that he had sold material to the Empire City Gerard Company, and that he had sold nothing to that company since January, 1910, because the material was non-union (447-449).

The witness gave the same testimony as to Murray & Hill (448), L. Marks & Son (450), Empire Door & Trim Company, and others (450-453).

William D. Maddox testified that he was a draughtsman employed by Morgan & Company; that from March, 1909, to April, 1910, he had been employed as a salesman (664); that he was told by Thompson-Starrett and others that they could not buy Morgan doors because they were non-union (666).

George Hatzfeld testified that he was manager of the woodworking department of Cross, Austin & Ireland, manufacturers of doors, sash, trim, etc., Brooklyn; that that company operates an open shop (707), and submitted a statement of goods

bought of McMillen Company for 1908, 1909, 1910 and 1911, which seems to have no point, as sales did not decrease in 1911 (709-710).

Charles R. Macauley testified that he was a jobber and manufacturer of sash, blinds, doors and trim (851-852); that he purchased from McMillen Company (852), and gives the figures as to the amount of his purchases from 1908-1911, inclusive (852).

The witness further testified that he operated an open shop (853); that if non-union goods are sold in New York it is necessary to sell them "under cover," taking the marks off (854) so carpenters will not know where they come from; that he was shut out of Manhattan all of 1911 (856-857), and by that he means that he cannot sell non-union trim there because union men will not erect it (863-864).

Bernard P. Salmon testified that he had charge of the New York business of the Iroquois Door Company (1034); that that company purchased from McMillen Company (1034); that he practically never purchased any McMillen material for the Borough of Manhattan (1035), and that the letter written by him (Complainant's Ex. 2) correctly shows his attitude (1035). (Complainant's Ex. 2 is found at p. 1934). The letter in substance is a request from the Iroquois Door Company to the McMillen Company to cancel all unfilled door orders placed with that latter company because the situation is such in New York City that the doors could not be used. The witness says, further, however, that this letter instructing cancellation was written in part because he felt that

the Iroquois Company could get doors cheaper elsewhere (1037).

John F. Richartz testified that he was a salesman for Crooks & Sons (1188); that he has sold Crooks' doors to Klappert's Sons, but could not sell them any now (1189); that the reason given by Klappert's Sons is that they can only use union made doors in New York City (1189), and that he stopped selling Crooks' doors to Klappert's Sons in the middle of 1910 (1189).

This witness gives substantially the same testimony as to other buyers of doors as follows: Palens' Sons (1190), Voight & Company (1190-1191), Walter M. Collins (1193), Jacob Zimmermann (1193-1194), Hantsche & Co. (1194-1195) and Casey & Co. (1194-1195). He also testified that he had solicited business from many others, but was refused for the same reason (1195-1197), many of them, as shown by the persons named as defendants, being members of the Master Carpenters' Association.

Charles W. Abele testified that he was the local representative of Morgan & Company (1271); that he had sold doors in Manhattan (1272) to Murray & Hill, Empire City Gerard Company, Van Nest and others mentioned (1272); that he did practically no business in Manhattan in 1911 (1272); that some of these customers said they could not handle non-union material because carpenters would not work upon it (1273-1274); that the question of using non-union material in Manhattan has always come up more or less; sometimes when the unions were watching the matter closely

non-union material could not be sold; at other times when unions became slack it could be sold, and that it has been hard to sell non-union material in Manhattan for the past two or three years (1274).

Alfred G. Foote testified that he was a clerk for the Loomis Company; that the Loomis Company operates an open shop (914-915), and the witness gives figures showing amount of business done with Morgan & Company (915).

Hiram E. Lister testified that he was a bookkeeper for Hardy, Voorhees & Company in Brooklyn, manufacturers of sash, doors and blinds (916), and gives purchases from Paine, Gould and Morgan from 1906 to 1911 (917).

Lester A. Lewis testified that he was vice-president of the Albro J. Newton Company, manufacturers of doors, sash and blinds; that that company operated an open shop, employing about 125 men; that he was the active salesman of the company (919); that he purchased materials for the company from Paine and Morgan (919), and purchased more last year than at any other time (925), and that in September, 1910, he received notices from eight customers that jobs had been struck (920).

Moritz Arnstein testified as to the amount of purchases that he had made from the Paine Lumber Company from 1907 to 1910, inclusive, showing that in 1907 he purchased $450 worth of material from the Paine Company, which increased in 1909

to $10,455.89, and decreased in 1910 to $473.76. He also testified that he bought from the Gould Company in 1909 $2,219.60 worth of material, in 1910 $12,029.50 worth, and in 1911 $6,937.99 worth (1485).

VI.

Instances of refusal of union men to handle complainants' trim.

Certain witnesses were called to testify as to various specific instances where the carpenters had either quit work or refused to work on buildings where some one of the complainants' trim was being used.

The Groll job, East 53rd Street, summer of 1910.

George Hagemeyer testified that he was an agent for trim on commission (343); that he bought certain trim August 10, 1910, from Worden (Bristol Company's agent) for P. J. Groll Construction Company, which was erecting a building on East Fifty-third Street (343); that he assigned the contract for the purchase of trim to William Klein (344); that the material was ready for delivery November 4th (344); that the delegates had notified Groll that carpenters would be withdrawn if material was delivered (345); that he met Storey and Simpson [Storey is dead—D. 2231] representing the union; that they said they would shut down whole job if material was delivered (346); [Simp-

son denies this, D. 2229]; that plumbers, steamfitters, masons and carpenters were at work (346); that the material was delivered Saturday afternoon and the evening of November 19th, 1910 (347-348); that Storey was at the building on Monday morning and took men off (348); that one carpenter said they would have liked to have stayed on, but would have to do as delegates said (349); that by the middle of the week no work was being done on the job (350); that the major part of this material came from the Bristol Door and Lumber Company (352); that there was nothing on the trim to show where it came from (355); that the trim was put up behind closed doors, union carpenters helping to do it (357-358); that the marble was put up while the trim was being put in, but no other trades were at work (358); that the trim was put up in about three weeks (359); that Simpson and Storey said in their talks men would not work on non-union materials (360); that Klein's mill was run under union conditions (368); that union men, as far as he knew, refused to work on non-union material if they knew it (370); that carpenters will work on any trim if delegate does not call them off, but that that is because they cannot tell union trim from non-union trim (373); that he believes men would work if delegates did not call them off, even if they knew material was non-union (374, 381); that he had had no experience prior to the Groll job (382); that there was a sympathetic strike at Fox and Tiffany Streets, Bronx (383-384); but that the material for that job did not come from any of the complainant's mills (384); that he had no personal knowledge of this strike, however, which occurred in May, 1911 (384, 390-391, 392).

William Klein testified that he did business under the name of Tremont Building Company; that he operates a union mill (395); that he purchased through Worden a carload of trim from the Bristol Door and Lumber Company for Groll Construction Company (396) for Fifty-third Street Building (397); that Donovan "pulled the men out" of his shop, nine in number, on account of Groll job, where he was erecting the non-union material (398); that he signed an agreement with the union, Donovan and Simpson signing for the union (Complainant's Ex. 8, 399; exhibit printed at page 440) and that Donovan told him that he had to buy material from union shops only (401-402). (The agreement is substantially a copy of the agreement made between the union and the Manufacturing Woodworkers attached to the complaint.)

Peter Joseph Groll [Simpson testifies Groll offered him a bribe (1847)] testified that he was president and treasurer of the P. J. Groll Construction Company (1452); that in the summer of 1910 he was engaged in constructing a building on East Fifty-third Street; that he was the general contractor; that the building was begun in May, 1910, and finished in February, 1911; that Hagemeyer had contract for trim (1453), but assigned it to Klein (1453); that he had a talk about trim with Storey, Simpson and entire Council before delivery of trim (1454); that Storey at first meeting wanted to know if union trim was going to be used, desiring to meet whoever was going to furnish trim; that witness thereupon arranged meeting with Klein and Hagemeyer (1454-1455); that he next saw Simpson about one month before trim was

delivered, who said the union had an agreement with the boss carpenters whereby they could not handle anything but union trim, and if non-union trim was being used they would be forced to call a strike (1455); that witness thought the trim was union trim, and was continually so informed by Hagemeyer and Klein, but it turned out not to be (1455), so he tried to adjust the matter; that he accordingly went to see the District Council (1456); that the representatives of the union said, pursuant to their agreement with boss carpenters, they would only handle union trim (1456); that the witness said he was going to use trim anyway; that the union representatives offered to help him get other trim; but that he refused the offer because they would not protect him in case he broke his trim contract with Klein (1457-1458); that when trim was delivered (1459) the carpenters quit work; that the following day after the delivery of the trim the union carpenters did not come back, but the non-union carpenters did (1459); that he had another talk with Storey, who said the trim being non-union, it would be a breach of contract for the men to set it up; that he (Storey) would be compelled to ask other trades to assist him (1460) [Storey is dead, 2231]; that he would take the matter before the Building Trades Council and inform them that non-union men were working on job (1460); that witness went to the Building Trades Council himself and informed them concerning the difficulties with which he was confronted (1461); that Crimmins was at this meeting [Crimmins is not in the list of defendants, although witness testified after examining list (1462)]; that there was no strike for a week or ten days; that then there was a committee meeting of

the delegates of the different trades at the building to see whether conditions existed as claimed by the carpenters (1462); that the men working at the building on that day were informed (this on hearsay) (1463) that they should not return to work the following morning (1463); that next morning, however, men went to work (1465); that after five or six days (1466) another meeting of delegates was had at the building, Storey representing the carpenters being there (1466); told witness that purpose of meeting was to get all trades to strike to compel him to rip out trim and put in union made trim (1467) [Blumenberg, business agent, contradicts this, 2311, 2312, 2324]; that the men all came back the next morning but elevator erectors; that there were about three of them [these came back in two or three days (1475); witness cannot say they were on strike (1479)]; that painters stopped and came back; iron men stopped for want of material (1468); that tile-layers stopped and came back in a day or two; that the whole job was completed with this trim (1468) by employing non-union carpenters (1469); that other trades worked with them (1469); that there was never a time when all the trades were off the building, though non-union carpenters were working all the time (1470); that witness knows that Storey is dead (1473); that as to the painters, he had a dispute with the painters about the time he had a dispute with the carpenters (1469, 1474); that his relations with the union delegates were of the most friendly nature, and that he believes that they were simply performing their duty and would have protected him if it had been in their power (1476).

The witness also explains how an attempt was made to deceive the union as to where the trim came from (1482-1483).

Oliver L. Worden (a salesman of the Bristol Door and Lumber Company, whose testimony has been heretofore in part digested) testified that he sold trim to William Klein (260) to be used for a building being erected by the P. J. Groll Construction Company; that the trim was shipped in October, 1910 (262); that since that time he has never done any business with William Klein; that Klein stated that he would have to have union material (262); that the carpenters had struck on that job after the material was delivered (263-264), and also stated that the other trades had struck as well (264); that just prior to the strike the witness had had a conversation with Simpson, a delegate (265); that the delegate wanted to know about the material Klein said he was getting from the Harper Lumber Company (266); that Simpson wanted the witness to use his influence to unionize Harper Company's mill (266); that Simpson said no more stuff could be shipped from Harper Company's mill unless it was unionized (267) [Simpson denies this, D., 2502]; that the material, however, for Groll's job did not come from the Harper Company's mill, but from Bristol; that Klein had misrepresented the fact because he (Klein) thought that the Harper Company's mill was partially unionized (267).

Simpson says that Klein and Hagemeyer said that material in question came from Harper in Meadville, Pa.; that he went to Meadville and found that material did not come from there; that these men showed him a shipping list from Harper

but that it was for Jersey material; that they wanted him to tell the council that he had seen the bill that came from Harper on the job, but that he told them he would have nothing to do with it (D., 2501-2502, 2506, 2195).

It may be said with respect to the testimony of Klein, Hagemeyer, Worden and Groll regarding the Groll Company's job that the testimony of Klein, Worden and Hagemeyer is all more or less hearsay. Groll, who was the general contractor, testified in effect that the union carpenters refused to erect the non-union trim; that he put it up with non-union carpenters and that all the other trades worked on the building with these carpenters; that the elevator men quit for a few days, but Groll could not say that they were on strike; that the painters quit for a few days but he was having trouble with them; that the iron men quit for a few days on account of lack of material. When the whole testimony is summed up, it amounts to nothing more than that the union carpenters refused to work upon the trim.

Crystal job—Riverside Drive and 119th Street, Spring 1911.

Hyman S. Crystal testified that he was president of B. Crystal & Son (584); that in 1911 that company had a contract with Parshelsky Brothers to furnish sash and glass to the company (585); that the sash was not put up when the other carpenter work was being done (586); that in June the witness had a meeting with representatives of the Union (590-592); that at the first meeting the representatives of the Union made no decision as to hanging the sash (592), saying they had given no

orders to the men (593); that at the second meeting in July, Kelso and Cook being there, no definite action was taken, it being stated at this meeting, however, that the sash was manufactured by Gould (594-595); that the carpenters went out in August, but this was after sash was hung (595); that the sash was hung in the middle of July (597).

It appears that the witness's father really handled this matter (599), who died in November (599), and that the only way that the witness knew that the sash came from Gould was by Mr. Merritt, complainant's counsel, telling him (602).

Isaac Parshelsky testified that he was treasurer of Parshelsky Brothers (1519), jobbers in door, sash, blinds, trim, plate and window glass (1520); that the company did $60,000 worth of business with the Paine Company in 1911 (1521); that in the spring of 1911 Parshelsky Brothers had a contract with Crystal & Son for glass and sash for a building at Riverside Drive and 119th Street (1521); that after the sash went to the job witness had a talk with Kelso and Cook (1521-1522); that they wanted him to come to the Union headquarters; that when he got there they wanted him to sign an agreement such as Werberlowsky, Friedlander, Arnstein and Edmonds had signed; that Kelso told him that if he did not sign they would not allow Crystal to use sash [Kelso denies this, D., 2369-2370]; that witness told them he would take the matter under consideration (1522-1523); that sash was subsequently hung (1524) after about one month by the carpenters who were originally at the job (1524), and that Parshelsky Brothers allowed Crystal $100 because Crystal said he had to pay delegate $500 (1524-1525). [Kelso says there was never any strike on account of trim, D., 2370-2372.]

The witness further testified that he had customers in Manhattan who refused to buy of him because he dealt in non-union materials (1525); that in November, 1911, he sold trim, doors and sash to Philip Schmidt, a Brooklyn builder (doors from Paine, trim from Bristol) (1526); talked with Wolfinger and Dhuy (1527); that they called strike on job, said would allow no union carpenters to handle trim because it was non-union; also said, "This ain't the only job we will make trouble on for you. We will make trouble for you on every job in this town" (1527-1528).

The witness also testified that he sold to Rudolph Norek doors, sash and trim for building on St. John Place and Schenectady Avenue; doors came from Paine, wardrobes and closets from Levin & Kronenberg, the latter a union shop, the trim coming from another union shop (1528); that a strike was called on the job in March, 1912 (1529); that he was at the job when delegate Swenson told the men to stop (1759); that Swenson told men to stop because trim came from "unfair" shops, was non-union trim (1530); that men said they wanted to work, but if they did they would be thrown out of the union and fined, and that he does not know the names of any men who said this (1530).

The witness further named certain alleged customers who he said told him they would not buy of him longer because of labor troubles (1531-1533); states that he believes carpenters have nothing against him personally except that he handles non-union trim (1535), and gives as his opinion that men have a right to refuse to work, but delegates have not the right to go about informing the men what is non-union material (1589).

City and Suburban Homes Co. Job, Sixty-third Street, Summer 1910.

Thomas F. O'Brien testified that he was superintendent of building construction for the City and Suburban Homes Company (638); that in the summer of 1910 he was superintending a building on Sixty-third Street (639); that there was a strike of carpenters there in August (639); that he heard no one directing the men to quit work (640); that Rice, delegate (641), said there was some trouble about doors (641); that he (Rice) was going back to headquarters (641); that two days after men quit work (642); that men said that Rice had ordered them to quit work as doors were non-union and that men returned to work four or five days later (643).

Edward S. Wilson testified that he was purchasing agent for the City and Suburban Homes Company (645); that several months before the strike on the Sixty-third Street job a delegate wanted to know whether he would purchase trim from a union shop; that witness told delegate that it was none of his business; that he does not know the name of the delegate nor can he describe him (646); that he knows nothing about the settlement of the strike (647); that he purchased doors from Raabe and says they came from Paine (648); that he (witness) does not want to buy from Paine because he has heard they employ old men, children and nursing women (650); that there is not much difference in price in union and non-union materials (653), and that prior to strike almost all the doors he purchased were non-union, but that since the strike he has purchased none but union doors (653).

Schwarzler's job, Clay Ave. and 166th St., Fall 1911.

Albert J. Schwarzler testified that he was a Bronx builder (1092); that in November, 1911, he was erecting four buildings at Clay Avenue and 166th Street; that he bought trim of Hubbell Hard Wood Door Co. (1093-1094); that he had a conversation with Wallace Anderson, who represented himself to come from the union, in September or October, 1911 (1095); that Anderson said there would be trouble about the doors (1096) [Anderson denies this, D., 2266-2269—says he told carpenters' trim was non-union, D., 2266]; that Anderson repeated this caution later (1097), saying doors were made by Paine; that witness saw Anderson again in November (1097), and told Anderson that he (witness) had a letter from New Rochelle that Hubbell's trim was union trim; that Anderson said that that would do no good, that he (Hubbell) wanted to use all the doors he had in stock, but union would not allow him to use them (1098); that he (witness) does not know that the doors were Paine doors (1116, 1127-1133); that witness did not hire the carpenters, the work being sublet (1125-1126); that the carpenter work was started by November 13, 1911; that the boss carpenter worked that day (1100) until about 4.30 P. M. when witness was informed job was stopped; that witness saw the carpenters themselves, who told him that the delegates said trim was non-union (1100); that this job seemed to have caused contempt proceedings, and, after matter was in court, it was settled by agreeing that union men should go back to work (1151). The witness admits that any testimony given by him as to sympathetic

strikes on account of the use of non-union trim is hearsay (1258).

Otto J. Schwarzler testified that he was the brother of the foregoing witness; that he was a builder in the Bronx (1163); that on November 14th (day after strike) the carpenters came to his brother's office and said they were down to the meeting the night before; that Anderson said they were not allowed to go to work on the job and to report in the morning at headquarters [Stern, foreman of carpenters, contradicts this, D. 2294-2295]; that the job was "unfair" (1164-1165); that all were willing to go back to work, but said they could not on account of Anderson knocking them off (1166), and that the witness is a member of the Anti-Boycott Association (1173).

Harry Sachs testified that he is a boss painter (1183); that in November, 1911, he was working on Schwarzler's building (1183-1184); that the first day carpenters came to work he (witness) heard a man whom the carpenters said was the delegate tell the carpenters that they should report in the morning to headquarters (1184); that the carpenters were on the job the next morning not working; that the carpenters said the trim was made by non-union labor (1185).

Frederick Heather testified that he was superintendent of Schwarzler; that he was superintendent of the Clay Avenue job (1443, 1444); that the carpenters first came to the job November 13, 1911 (1444); that they came back to the job but did not go to work on November 14th; that they were employed by Cohen & Naviasky; that shortly after

8 A. M. on November 14th they left the job and said they were going to leave (1445) as they had been ordered out by the delegate (1445); that they returned in an hour or an hour and a half; that he asked one Stern why they did not go to work; that he said they had been ordered out by a delegate because trim was non-union (1445-1446); that he asked others of the men if they were satisfied to go to work; that they said yes, but delegates would not allow them to (1446); that at a meeting at Schwarzler's office Schwarzler had a typewritten paper which he read to the men and which the men said was true; that the men came back almost every day (1447) for two weeks; that he understood that the real trouble was about the doors, but this was not mentioned (1449); that the trim was non-union; that the men came back to work in about three weeks (1449).

Happel Job, Hubbell Job, Summer 1911.

Edward Van Martar [Simpson says that Van Martar suggested a bribe, D. 2234] testified that he was superintendent of Hubbell Hard Wood Door Company (1344); that that company ran a union shop (1345); that the Hubbell Company made a contract with Adam Happel to furnish trim for building at Tiffany and 167th and 169th Streets; that William Simpson (1346) came to him after there had been some deliveries and wanted them to buy doors from the union shops (1347); that the doors furnished were made by Paine (1349); that he refused to tell Simpson where doors were coming from (1352); that the doors were delivered in August (1353); that the witness met Donovan on the job after doors got there; that the carpenters were there but not working [Dono-

van denies there was any strike (2241)]; that the carpenters worked up to the time the doors got there (1354); that witness threatened Donovan with trouble on account of the Paine Lumber Company injunction; that within an hour the carpenters were at work again (1355); that the Hubbell Company had some 12,000 doors made by the Paine Company (1364); that the Hubbell Company wanted to make arrangements with the union that if union men would hang these doors Hubbell would thereafter purchase only union doors (1365); that Hubbell Company had job at 151st Street and Broadway to erect trim (1358); that Paine doors were used (1358); that the carpenters quit work on this job (1358-1359), and witness went to headquarters of Joint District Council about it; that this was in August or September, 1911 (1359); that the witness met Nyland, Simpson, Anderson, etc. (1360); that he had several meetings with them (1360-1362, 1365); that the doors had not been delivered when the strike was called; that at one meeting they voted to erect trim but not to hang doors (1362); that the Paine Lumber Company was never mentioned at any of these meetings (1366, 1405, but see 1367, 1399); that the doors were never hung on this job; that doors were purchased in Brooklyn to complete the job (1368); that the Hubbell shop was a union shop; that the trim on the job was made under union conditions (1352, 1384), consequently only the doors were objected to.

Weinberg Job, Brooklyn, Fall 1911.

Morris Weinberg testified that he was a Brooklyn speculative builder (1493); that in the fall of 1911

he was conducting some building operations at Park Place and Saratoga Avenue; that he bought the trim for the job from Parshelsky Brothers, October, 1911 (1493-1494) [Parshelsky says these doors came from Paine and sash from Gould (1531)]. When trim arrived on job (1495) Erickson, representing the union, claimed trim was non-union from Paine Lumber Company (1496); that the witness went to local headquarters, saw Goldberg, Erickson and Wolfinger and two or three others; that after consideration among themselves, Wolfinger and Erickson saw witness and told him that they had voted not to give him union men for job (1497-1498); that a few days afterward, after more conferences, the two men he had on the job quit work (1498-1499); that about a dozen men stood around the building ready to start work but said they could not go to work, for if they did they would be fined (1499-1500); that he put the trim up with non-union labor, which it was no trouble to get (1501), and that some union men returned and other trades worked along with non-union carpenters (1509, 1516).

The witness being further questioned regarding complaint that was made against him in an association to which he belonged, testified that he was put on trial in Labor Lyceum Association, an association to which he belonged, on account of employing non-union labor on this job (1515-1516); that he does not know whether complaint was made against him on account of employing non-union painters or carpenters (1517); that his only information as to where the doors came from was from Parshelsky Brothers and the delegates who said they came from Paine (1518).

Hotel Rector, Fall 1910.

Rayburn Clark Smith testified that he was vice-president of the George W. Smith Company, manufacturers of woodwork (1967); that he did business with Crooks & Son; that in 1910 he had certain doors assembled by Crooks, Smith & Company to furnish material, Crooks to furnish labor; that doors were sent to the Philadelphia factory of the Smith Company (1968) and from there to Rector Hotel in New York between August and December, 1910, for which building Smith Company had contracted to furnish and install all interior trim (1969); that there was a strike on building in December, 1910; that the witness was not at the building when the men quit work (1969-1970); that he had a talk with Cook and Rice after strike had occurred at the Building Trades Employers' Association (1970); that the Trade Board of the Master Carpenters' Association and of the Brotherhood was present; that he cannot tell the names of those who were present at that meeting; that the general contractor on the Rector job was the Thompson-Starrett Company (1971); that more than one meeting took place; that Dinwiddy was at one of these meetings representing the Thompson-Starrett Company (1971); that the meeting was the result of a complaint made by the Brotherhood that certain doors delivered at the job were non-union made (1973); that some one at the meeting said the doors were made by Crooks & Son (1973-1974); that witness made statement that some of the doors were made by union labor at their own shop and protested because carpenters were withdrawn; that at that meeting, or a subsequent meeting, it was agreed that such doors should be installed (1975);

that Cook and Rice were present at each meeting (1975); that the men did not go back to work (1976); that within a few days (1977) witness went to see strike committee of Brotherhood of Carpenters at Fifty-ninth Street; that Cook and Rice were there (1976); that the statement was made at this meeting by representatives of the union that the doors were not union made and ought not to be hung; that the doors were afterward removed from the building, certain moulding removed and replaced by other moulding, and that then the doors were installed (1977-1978); and that the only action take by the trade board was to refer the whole matter to the strike committee of the union (1983).

VII.

Instances of refusal of union men to handle the trim of non-union shops other than complainants'.

A large number of witnesses were called who testified concerning the refusal of members of the Brotherhood of Carpenters to work on the trim manufactured by non-union shops other than complainants'.

William R. Rogers testified that he was a clerk at the Central Branch of the Young Men's Christian Association; that up to the fall of 1911 he was a member of the Brotherhood of Carpenters; that at that time he was working for O'Brien Brothers on

a job in *East Fourth Street, Brooklyn* (614), on 15 apartment houses, from June, 1910, to October, 1910, as superintendent (614); that a strike of carpenters took place (616) about the middle of September; that the men were called out by O'Grady; that O'Grady said to the men that they would have to go out because of using Albro J. Newton's trim; that O'Grady told the witness that he would have to go out (616); that he (witness) did not go out; that the carpenters on leaving said they went out because it was Newton's trim; that they said that they did not want to go out (617); that he (witness) was fined twenty-five dollars by the union (620); that he did not pay the fine (621); that he thereupon took it for granted that he was expelled (621); and that there was no trouble to get non-union labor to put up the trim (626).

Edward J. Maguire testified that he was a speculative builder (783); that in the fall of 1910 he was erecting a building on *St. Mark's Avenue in Brooklyn* (783), that he had a conversation with Erickson purporting to be the union's representative; that on September 17th Erickson said he would have to call a strike on the job because Newton's trim was being used; that Newton was the concern that the union was dealing with (785); that if anybody's else trim was being used at the job, Cross, Austin & Ireland or Bossert's, he (Erickson) would not interfere, but that in time the union intended to proceed against other firms (782); that it was the intention to attack other mills, one by one (788, 794, 797, 808); that the carpenters quit at noon (789), and the Brooklyn Association of Builders was asked to sign an agreement not to use non-union trim (796).

Frederick B. Norris testified that he was a speculative builder; that in the fall of 1910 he was building five houses at *Lincoln Road and Bedford Avenue, Brooklyn;* that he purchased the trim from Newton (818); that the day before September 17, 1910, he met Rice and Erickson, representing themselves as coming from the Brotherhood of Carpenters (819); that they said the work on the houses would be stopped (820); that they said they were going to unionize Newton's mill and there would be trouble (820); that on September 17th, the men struck, saying that the delegate had stopped them (822); that a man on the job whom witness does not know the name of said he was sent by Erickson to order men out (822), and that the men came back in about three weeks (825).

The witness further explains that a speculative builder is one who builds houses to sell (826).

George L. Hilton testified that he was secretary of the Brooklyn Builders' Association; that in the fall of 1910 (875-876) he was visited by Erickson and two or three others; that these men said that the builders were handling non-union trim and expected that there would be trouble (876); that they (Erickson and the others) were going to unionize the different mills in Brooklyn, and requested assistance of the builders (877-878); that on September 15th, 1910 (878), Erickson, Wolfinger and Rice called on the witness; that they said there was going to be trouble on account of "unfair" trim, and mentioned the names of Albro J. Newton, John S. Loomis Company, Cross, Austin & Ireland, and Louis Bossert & Son; that they further said that there were two delegates on from the West and that there would be more to help in the work of union-

izing these mills; that they wanted the Brooklyn builders to take the matter up direct with the mills, which would probably accomplish what they wished (878-879); that at a third meeting a few days after Erickson, Wolfinger and Rice said strikes had been called on jobs where non-union trim was being used (879); that the strikes were against members of the Association where Newton's trim was being used (879); that after they got this mill in line they were going after Loomis, then Cross, Austin & Ireland, then Bossert (879-880); that negotiations were in progress for an agreement between members of the witness's association and the Brotherhood (884), and that then an injunction was issued and stopped further negotiations (889, 895-896).

John T. Allen testified that in the fall of 1910 he was acting as superintendent for George A. Lovett in connection with the construction of certain buildings at the corner of Eighth Avenue and Montgomery Place in Brooklyn (909); that the trim was furnished by Newton; that two men representing themselves as coming from the union said that the dressers must be taken off the building; that if the dressers were not taken off the building they would call a strike; that thereupon witness had Newton take dressers off temporarily; that no strike occurred (909-910), and that the two men were O'Grady and Erickson (911).

George Gough testified that he was a member of the firm of the Church & Gough, builders; that in October, 1911, the firm was erecting certain buildings at Howard Avenue and Bainbridge Street, Brooklyn; that they purchased material from Louis Bossert & Son (943); that the delegate Dhuy in-

quired where they got the trim (944); that he (the delegate) had intended Gough should get a paper to the effect that he should not handle non-union trim (945); that the carpenters struck in a few days (945-946); that the witness saw Dhuy again in a few days, who said job was stopped because of the use of non-union trim, and that it could go on if they (the firm) would sign a paper not to use non-union trim (946), whereupon he signed such paper (947).

William Beckman testified that he was a speculative builder doing business in Brooklyn (1023-1024); that in the summer of 1911 he was putting up some buildings in Brooklyn on Forty-sixth Street, between Fourth and Fifth Avenues (1024); that the carpenters quit work; that the delegate a few days after said if he would sign an agreement the work would go on; that he thereupon signed and the work proceeded; that the witness does not know the man whom he described as a delegate (1025-1026), and that the agreement was to the effect that in his next building operations he would purchase trim from union mills (1031).

Christian Benjes testified that he was a master carpenter (1042); that in the spring of 1910 he was erecting some buildings in East Tenth Street, Manhattan; that he bought materials of Bossert (1043); that some one representing himself as a delegate of the union said he must cancel his contract with Bossert; that he does not know the man's name; that he could not recognize the man if he saw him; that he did cancel his contract (1044), because (he says in effect) he wanted to employ union men (1045-1046).

Charles Rubinger testified that he was a builder, building for himself (1047); that in the spring of 1910 he was erecting a building in West Twelfth Street; that he had planned to make a contract with Bossert for trim (1047-1048); that in July, 1911, he had a conversation with some one pretending to come from the union (1048) by name French, who wanted to know where witness bought trim, and said he would take framers off if he would not tell him (the building being up to the third tier of beams). The man French not being told where witness intended to get trim, he did take the framers off; that the carpenters stayed off for about three days (1048-1049); that witness went to Bossert and told Bossert that that he would have to cancel the contract, and he did; that the witness employs union carpenters, because if he did not the other trades would not work (1050).

This statement that the other trades will not work, however, is only upon hearsay (1053). Rubinger did not himself employ the carpenters, they were employed by a contractor named Soomsky (1051).

Louis Abel testified that he was a contracting carpenter in Brooklyn (1058); that in the spring of 1911 he had a contract with Bossert for trim for a building in Long Island City (1058); that a party representing himself as a delegate called him on the telephone wanting to see him at nine o'clock about doors, saying that he could not let the doors go in. The witness thereupon said that he could not get at the job at nine o'clock, whereupon the delegate told him that if he could not get there at nine o'clock, he (the delegate) would call off the carpenters; that the witness got there at eleven o'clock and found that the carpenters had quit work and were stand-

ing around (1059); that the delegates and organizers were from Long Island City, two each (1059); that the delegate said that he would not allow the men to hang the doors; that "they" put a ticket on duty; that the men wanted to finish up but pickets were there to stop them (1060); that the men said that one delegate there was Wolfinger (1062).

That thereafter another master carpenter was engaged, who removed the particular doors in question and installed others (1061). On cross-examination this witness testified that the delegate told him that the men would not handle non-union made material, and that there were about thirty doors in question (1063).

Archibald C. Bush testified that he was a builder doing business under the name of the Bush Building Company (1072); that in the fall of 1910 he was building apartment houses at Bedford Avenue and Avenue D, Brooklyn; that he purchased materials from Newton (1073); that he had a talk with the delegate named Heinen (1074) on September 19th [Heinen's card, Complainants' Exhibit 31, put in evidence (p. 1074)] that delegate said he was calling men off because they were using "unfair" trim; that the delegate therefore said that they had tried to enforce their demands at Newton's shop; that they had not succeeded in getting any attention from Newton, and that they were taking this step in order to bring about their ends to unionize Newton's mill (1075 and 1076, 1089); that he thinks that delegate said they were striking on all buildings where Newton's trim was used (1078); that he heard the delegate tell one framer that he must quit work (1079), and that the men said they quit work because they were ordered to quit (1081).

Jacob Schwarz testified that he was a Brooklyn builder employing no men directly, but sub-letting all his work (1259-1260); that in the spring of 1911 he bought material from Louis Bossert & Son for buildings 201-207 South Second Street building; that he met Dhuy, representing himself as coming from the union (1260) about then; that Dhuy wanted to know where he was going to get the trim; that the witness told Dhuy that he was going to get it from Bossert, that thereupon Dhuy asked witness to cancel contract with Bossert because his trim was non-union (1261); that about October Dhuy called a strike; that he told men it was because non-union trim was being used (1261); that witness signed paper in order to settle the matter up, which paper was to the effect that he would not use any more non-union trim (1263).

VIII.

Investigations made by certain mill men who ascertained conditions under which trim coming into New York was made.

Certain witnesses testified that an investigation had been carried on on behalf of three mills to ascertain whether the Brotherhood was living up to its agreement with these mills. The investigations had no connection of whatever kind or nature with any of the defendants.

Herman Kertscher testified that he was a cabinet manufacturer (198); that he was President of Kertscher Company with factories at Elmira

(199), manufacturing general house trim (200), operating a union shop under agreement with Carpenters' Union (200); that the greater part of the business of Kertscher Company was in New York City (202); that he employed one Friedenrich, through one Humphrey, to ascertain condition under which work coming into New York was made (202-205); that the purpose of the investigation was to ascertain the wages their competitors were paying—whether union or non-union (206).

The witness produced certain books containing Friedenrich's reports (206). Copies of these books were sent to Murray, of Greenwich, Connecticut, whom the witness believes to be connected with the Carpenters' Union (1546). The object in sending the reports to him was in order to make terms with Murray (1549). Witness says that they found one concern getting better terms than his mill (1550) and that getting the information had no connection with any of the complainants (1550).

William D. Maddox testified that he was employed in February, 1910, for three weeks (1216) by Palen, Kertscher, Humphreys & Turner, manufacturers of trim, to watch cars of trim coming into New York, finding out where they came from and where the material went to (1217); that they wanted him to report to them if he found any non-union trim coming into New York (1218); that some one of these gentlemen said that National Union told them that if they could bring proof that stuff was being delivered here the National, or whatever it might be, would take it up with the New York unions by way of fine (1219); that Turner said they had signed an agreement with the Union and wanted to find out whether non-union

material was coming into New York (1220, 1234, 1235).

Elizabeth Koenig, a stenographer in the employ of Kertscher & Company, was called in this connection (239), but her testimony does not seem to be of any value.

Frank H. Humphrey was called on another matter in connection with which his testimony has been heretofore digested and was not asked concerning these investigations on direct examination. On cross and redirect-examination, however, he testified that the investigations were made for the benefit of Kertscher, H. W. Palens' Sons (236) and the Jamestown Mantel Company (237); that the Master Carpenters' Association and the Manufacturing Woodworkers' Association had nothing whatever to do with the investigations; that they were carried on so that the concerns mentioned might make their yearly agreement with the union (237); that the investigations were carried on for a good part of 1910 after the companies mentioned had renewed their contracts and made their contracts with the union (238).

George R. Murray, mentioned by Kertscher, testified that he was a general organizer of the Brotherhood (2488); that he had nothing to do with the employment of Friedenrich (2487); that he made the agreement with Kertscher's mill; that the reports above mentioned were sent to him (2487); that the same were of no use to him (2488), and Kertscher told him that he got the information in these reports because he (Kertscher) wanted to find out "how our people were treating him" (2488).

IX.

The testimony of the Secretary of the Building Trades Employers' Association, the Secretary of the Master Carpenters' Association and the Secretary of the General Arbitration Board.

This testimony relates to formal matters as to the associations and agreements, except that McClurg gives testimony regarding "unfair lists" in existence prior to 1908.

William J. Holmes testified that he was Secretary of the Building Trades Employers' Association (518); that the membership was about 900 (518); that the Master Carpenters' Association is a part of the Building Trades Employers' Association (518); that the Building Trades Employers' Association has been in existence since June, 1903; that the Master Carpenters' Association and the Manufacturing Woodworkers' Association have been members ever since; that the Building Trades Employers' Association operated under what was known as the Joint Arbitration Plan; that that plan is attached to the complaint marked "Exhibit A"; that the original plan was dated July 3, 1903; that it was subsequently amended April 22, 1905 (519); that it continued in operation from 1903 to 1910; that all the various trades connected with the Building Trades Employers' Association were parties to the plan, likewise the unions of mechanics; that the United Brotherhood of Carpenters and Joiners of America were parties to the plan, likewise the Master Carpenters' Association

and the Manufacturing Woodworkers' Association (519-520); that there was also another union of the carpenters parties to the plan, viz.: the Amalgamated Woodworkers, and that the minutes of the Arbitration Board came into the hands of the witness in January, 1910, given to him by the then Secretary, Mr. Henry (520).

The minutes of the Arbitration Board and its Executive Committee are marked for identification (522).

John McClurg testified that he was Secretary of the Master Carpenters' Association (523); that there are very few concerns of any size that do not belong to his association (525); that in 1907 the Master Carpenters' Association circulated among its members information as to the Manufacturing Woodworkers whom the union deemed "unfair"; that this continued for two years and it was discontinued in 1907 (527); that the agreement of October, 1909 (the present agreement, 526) was the first agreement since the agreement which terminated in 1907 (527); that there were over 2,000 Master Carpenters in New York City (521); that the members of the Master Carpenters' Association do the larger part of the important work, but not most of the work (540), and that the Master Carpenters' Association refused to recognize the "unfair lists" (548-549). An unfair list for July 20, 1907, was put in evidence (Complainants' Ex. 16, 541).

John S. Henry testified that he was Secretary of the General Arbitration Board from June, 1909, to May, 1910 (719). By this witness were proved the minutes of the Executive Committee of the General Arbitration Board of January 5th, March 29th,

April 7th, July 28th, August 2nd and December 22nd, 1909 (Complainants' Exhibits 13, 14 and 15) (724).

The minutes of February 24, 1909 (736-759) contain an argument as to whether the Joint Arbitration Plan applied to trim (758). It was in the course of this argument that David W. O'Neil is reported to have used the words that "not a stick of that trim shall be used in New York." But when the context is examined (760) it will be seen that what Mr. O'Neil meant was that the Brotherhood could not ask the members of the Master Carpenters' Association to agree to use only union trim so long as Brotherhood members were putting up non-union trim for others. Further various extracts from the minutes were made (762-771) which do not seem to have any relevancy whatever to the controversy.

It is to be noted that the Joint Arbitration Plan has not been in operation since any of the matters complained of by the complainants have had existence.